Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

GEORGE PHILLIPS and PHILIP VITALE,

Petitioners,

vs.

BOROUGH OF KEYPORT, a political subdivision of the State of New Jersey, VICTOR RHODES, in his official capacity as Construction Official and Zoning Officer of the Borough of Keyport, and individually, BOARD OF ADJUSTMENT of the Borough of Keyport,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where a zoning ordinance is content-based and substantially restricts speech, must there be — for the law to be constitutionally valid — an identification *in the legislative record* leading to the enactment of the law of:

(a) a substantial, content-neutral governmental interest which the law is intended to serve, and

(b) substantial evidence that the law is needed to and is narrowly tailored to serve that interest?

Or, is it sufficient that the governmental entity is able to identify such a substantial, content-neutral interest and adduce substantial evidence of necessity and narrow tailoring in the context of litigation upon the ordinance being challenged?

STATEMENT PURSUANT TO RULE 29.6

There are no parent companies nor non-wholly owned subsidiaries of any corporate petitioners.

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To the Honorable, the Chief Justice and Associate Justices of the United States Court of Appeals for the Third Circuit:

George Phillips and Philip Vitale, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 21, 1997.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Third Circuit filed on February 21, 1997 reversed the judgment against the petitioners on their First Amendment claim but rejected the petitioners' argument that they are entitled to a mandate requiring the entry of a judgment in their favor on that claim. The Third Circuit disagreed with the petitioners that a governmental entity which adopts a content-based ordinance may successfully defend a First Amendment challenge only if it can demonstrate that it was exposed, before taking action, to evidence from which one could reasonably conclude that undesirable secondary effects would occur in the absence of legislative action and that the particular action taken was narrowly tailored to ameliorate those secondary effects. The opinion of the Court of Appeals is printed in Appendix A at 1a.

The Memoranda, Opinions and Orders of the United States District Court, District of New Jersey which these petitioners appealed to the Circuit Court were entered or filed on July 16, 1993, February 3, 1994 and February 14, 1995 and are unreported. They are printed in Appendix D at 80a, Appendix C at 70a, Appendix B at 63a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 21, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

United States Constitution, Amendment I.

Borough of Keyport Ordinance No. 31-92

The full text of the ordinance is printed in Appendix F at 108a.

STATEMENT OF THE CASE

A. Nature of the Action and Jurisdiction

The petitioners challenged, on free speech grounds, the Borough's ordinance defining certain uses as "adult entertainment uses," requiring those uses to be located in the Borough's lone industrial district and prohibiting them from being located within a specified distance of certain protected uses including residences and residential zones. On a motion to dismiss, the United States District Court for the District of New Jersey dismissed the petitioners' First Amendment claims. The United States Court of Appeals for the Third Circuit reversed the District Court and remanded for further proceedings consistent with its opinion. However, the Circuit Court rejected the petitioners' argument that they are entitled to a mandate

requiring the entry of judgment in their favor on their First Amendment claim. In particular, the Circuit Court disagreed with the petitioners that, if a governmental entity adopts an ordinance restrictive of speech — especially a content-based one — the governmental entity may successfully defend a First Amendment challenge only if it can show that it was exposed, before taking action, to evidence from which one could reasonably conclude that undesirable secondary effects would occur in the absence of legislative action and that the particular action taken was narrowly tailored to ameliorate those secondary effects. The Circuit Court held, instead, that it is sufficient if a legislative body can produce in court, after the ordinance has been challenged, whatever justification is required of it according to the applicable constitutional doctrine.

A timely petition for rehearing was filed and was denied with the Circuit Court's Order of June 3, 1997. Appendix E at 106a.

Phillips and Vitale now petition this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment of that court where the validity of an ordinance is drawn in question on the ground of its being repugnant to the Constitution. 28 U.S.C. § 1254(1).

B. The Ordinance and its Application to the Petitioners

This appeal concerns the issue of whether a content-based ordinance which is restrictive of free speech rights can survive a challenge to its constitutionality on First Amendment grounds in the absence of an identification in the legislative record leading to the adoption of the ordinance of a substantial content-neutral governmental interest sought to be served by the ordinance's provisions and substantial evidence in that same legislative record demonstrating that the Legislature's conclusions were reasonable and that the ordinance's provisions are narrowly tailored to achieve the interests sought to be served.

In early 1992, George Phillips and Philip Vitale determined to establish an adult book and video store in a vacant one-story building on Route 36 in the Borough of Keyport, a small community in Monmouth County, New Jersey. To that end, they applied to the Borough's Construction Official and Zoning Officer, Vic Rhodes, for a zoning permit[1] to "operate a retail bookstore w/novelties — amusements & videos." Phillips and Vitale made plain to Rhodes that their books and videos would be of adult content. There was at that time no zoning restrictions specifically pertaining to commercial establishments selling, renting or exhibiting sexually explicit material. On March 9, 1992, after inspecting the property Rhodes issued the requested zoning permit.

As Phillips and Vitale began to prepare the building for operation as an adult entertainment establishment, a number of Borough residents including one who lives directly behind the property at issue, urged Borough officials to somehow stop Phillips and Vitale from opening the proposed adult entertainment establishment. The Borough attorney suggested that one method might be to review and overturn Rhodes' decision to issue the zoning permit.

The application for the permit correctly denominated the property's address. Rhodes had physically inspected the property before he issued the permit (and, therefore, was under no misapprehension as to the location of the property). However, the permit application contained an incorrect zoning lot number. Charles Barreca, who resides immediately behind the petitioners' location, filed an appeal with the Borough's Board of Adjustment. The Board, after a hearing, vacated Rhodes'

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1. A zoning permit acknowledges that the use described by the applicant for the permit complies with and is a permitted use at the location in question according to the zoning ordinances of the Borough. N.J.S.A. 40:55D-7.

issuance of the permit because of the incorrect lot number designation.

Phillips and Vitale filed a nearly identical application for a zoning permit but with the correct lot number. Rhodes, however, delayed action on the application. In the interim, the Borough adopted Ord. No. 31-92 entitled "Adult Entertainment Uses," (hereafter "the ordinance"). *See* Appendix F at 108a. The ordinance defined "Adult Entertainment Uses," restricted them to the Borough's lone industrial district and prohibited them from being located within 1000 feet of certain protected uses including residences and residentially zoned areas.

The Ordinance was first introduced at a regularly scheduled meeting of the Borough Council on July 14, 1992. The minutes of that meeting indicate that the ordinance was read by title, offered for adoption and adopted by unanimous vote of those present. The minutes do not indicate that the Council took any testimony or, in any way, considered any reports or other evidence.

It appears that the ordinance was then referred to the Borough's Planning Board for review. The Planning Board conducted a hearing at which it received a legal opinion concerning the ordinance and heard an oral report by an engineering expert. The Board recommended that the ordinance be passed with three changes — the most significant of which was to reduce the proposed protective buffer from 1000 feet to 500 feet.[2]

On July 18, 1992, at a regular meeting of the Borough Council, the ordinance was amended to provide that adult

2. These events were recounted by the Borough in its Brief in the District Court. There is nothing in the record by way of evidence, in any form, respecting the proceedings before the Board, or the opinion of its counsel or the Borough Engineer.

entertainment uses are prohibited from being located 500 instead of 1000 feet from certain designated protected uses. Thereupon, the ordinance was read as amended and the hearing opened to the public for comments or questions. There being none, the hearing was closed; the ordinance was offered for adoption as amended and unanimously adopted by those present. From a review of the minutes of that meeting, it appears that the Council took no testimony nor considered any reports or other evidence with respect to the ordinance.[3]

The location chosen by Phillips and Vitale is in a highway commercial zone — not an industrial zone. Further, the location's rear lot line coincides with the rear lot line of property in residential use (Barreca's) and a residential zone boundary line. On about September 9, 1992, Rhodes denied the latter application of Phillips and Vitale for a zoning permit citing as one reason ". . . issuance of the permit sought would be inconsistent with [the ordinance]."

C. The Rulings Below

An appeal of Rhodes' determination to the Borough's Board of Adjustment was unavailing. Phillips and Vitale then brought this action in the United States District Court for the District of New Jersey according to the authority of 42 U.S.C. § 1983. Among the causes of action asserted, Phillips and Vitale maintain that the ordinance is violative of their First Amendment free speech guarantees. Phillips and Vitale contend that, as the ordinance is content-based and works a substantial restriction of freedom of speech, it is presumptively unconstitutional. It is the burden of the Borough to demonstrate that it is designed to

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3. Nor was any evidence introduced by the Borough in the District Court to demonstrate that the ordinance was intended and needed to minify some deleterious, content-neutral secondary effect and that it was narrowly tailored to accomplish that end.

and necessary to serve some substantial or compelling government interest and is narrowly tailored to do so. In making that demonstration, the Borough is obligated to show that there is substantial evidence in the legislative record leading to the adoption of the ordinance to support a reasonable legislator's conclusion that the ordinance is needed to minify unwanted, content-neutral secondary effects produced by adult entertainment establishments. Further, the Borough must demonstrate that the ordinance is narrowly tailored to achieve that end. The District Court dismissed Phillips and Vitale's First Amendment factual basis claim on a motion to dismiss. *See* Appendix D at 102a-105a. Looking no further than the preamble of the ordinance, the District Court found that the ordinance is designed to serve a substantial governmental interest. It further observed that:

> Although the Borough's findings may have been a bit conclusory, they were at least as specific as those in *Renton* [*v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)] and the Court finds them sufficient.

See Appendix D at 104a.

On appeal, the Court of Appeals noted that the District Court had sustained the constitutionality of an ordinance substantially burdening the exercise of protected speech:

> . . . without a record supporting the reasonableness of any legislative expectations regarding the likelihood of these secondary effects and the ameliorative effect of the ordinance.

See Appendix A at 17a. The Court of Appeals further noted

that Phillips and Vitale, in their Complaint, alleged, *inter alia*, that the ordinance "is not rationally related to a valid governmental purpose," "is not intended to further any substantial or compelling governmental purpose," "significantly restricts access to protect[ed] speech," "is not supported by a reasoned or significant basis," "is not narrowly tailored," and "is a subterfuge for the suppression of expression protected by the First Amendment." The Court of Appeals said:

> When an ordinance burdening speech is thus challenged, it must be "*justified*" by the state. *Renton*, 475 U.S. at 48. However, because the Borough filed no answer in this case, we do not yet know how the Borough will seek to justify the Ordinance. There is no articulation by the state of what it perceives its relevant interests to be and how it thinks they will be served. This is particularly troublesome in a case, like this, where the legislative findings speak in terms of "serious objectionable operational characteristics," "deleterious effects," and "the deterioration of the community" without identifying in any way those "characteristics," those "effects," or that "deterioration."
>
> On remand, the Borough must be required to articulate the governmental interests on the basis of which it seeks to justify the ordinance. It should then have to shoulder the burden of building an evidentiary record that will support a finding that it reasonably believed those interests would be jeopardized in the absence of an ordinance and that this ordinance is reasonably tailored to promote

> those interests. It is the Borough that carries the burdens of production and persuasion here, not the plaintiffs. *Renton*, 475 U.S. 41; *Schad v. Mt. Ephraim*, 452 U.S. 62 (1981). Moreover, it is the District Court, not the Borough, that must make the findings necessary to determine whether the ordinance is consistent with the First Amendment. See *id.*; *Renton*, 475 U.S. 41.

See Appendix A at 17a-18a.

With respect to Phillips and Vitale's contention that pre-enactment evidence in the legislative record is required, the Circuit Court said:

> While we thus agree with appellants that they are entitled to a reversal of the judgment against them on their First Amendment claim, we reject their argument that they are entitled to a mandate requiring the entry of a judgment in their favor on this claim. Phillips and Vitale read *Renton* and our decision in *Mitchell* [*v. Comm'n on Adult Entertainment Est.*, 10 F.3d 123 (3rd Cir. 1993)] as endorsing a *per se* rule that any governmental regulation of speech is invalid if the adopting entity did not have before it, at the time of adoption, evidence supporting the constitutionality of the action taken. Thus, in appellants' view, a governmental entity may successfully defend a First Amendment challenge of the kind here mounted only if it can show that it was exposed, before taking action, to evidence from which one could

reasonably conclude that undesirable secondary effects would occur in the absence of legislative action and that the particular action taken was narrowly tailored to ameliorate those secondary effects. We find no such rule in *Renton, Mitchell* or any other governing precedent.

There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis had been submitted to the legislative body prior to the enactment of the legislative measure. We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with the constituents and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures. We perceive no justification in policy or doctrine for abandoning our traditional approach. Moreover, we believe that insistence on the creation of a legislative record is an

> unwarranted intrusion into the internal affairs of the legislative branch of governments.
>
> If a legislative body can produce in court whatever justification is required of it under the applicable constitutional doctrine, we perceive little to be gained by incurring the expense, effort, and delay involved in requiring it to reenact the legislative measure after parading its evidence through its legislative chamber . . . While we agree with appellants that the creation of a legislative record can have probative value on what lawmakers had in mind when they acted, we do not understand why its absence should be controlling when the court is otherwise satisfied that the legislative measure has a content-neutral target.

See Appendix A at 28a-29a.

Judge Rosenn, writing in dissent, agreed with much of the majority's analysis. He parted company with the majority, however, because

> . . . in the face of a decision of the Supreme Court and decisions of a substantial number of United States courts of appeal to the contrary, [the majority] holds today that a legislative body need have no record before it at the time of enactment justifying an ordinance regulating protected speech. Although I fully empathize with the efforts of the Borough of Keyport to preserve a wholesome quality of community life, I

> cannot lend my support to the majority's potentially dangerous disregard of an established safeguard in protection of cherished First Amendment rights, namely, a record at the time of enactment justifying the restrictive regulation of protected speech.

See Appendix A at 53a.

The dissent maintains that:

> [t]he unavoidable inference from *Renton* is that the municipality must rely upon something at *the time of enactment* justifying its action limiting freedom of speech. The various courts of appeal, including our own in *Mitchell* . . . have emphasized the Supreme Court's statement that
>
> > [t]he First Amendment does not require a city, *before enacting* such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*
>
> *Renton*, 475 U.S. at 51-52 (Emphasis added). Accordingly, not a single court of appeals has interpreted *Renton* as requiring absolutely no pre-enactment evidence [footnote omitted]. The position adopted by the majority leaves the Third Circuit an

> outlier among the United States courts of appeal.

See Appendix A at 55a-56a.

The dissent also pointed out that:

> [i]f we look to cases decided in our sister circuits, we see that no other circuit in this country has espoused the extreme, and I believe incorrect, position taken by the majority. Cases similar to the one at bar have been decided in the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits. [Footnote omitted.] Every one of these circuits has interpreted *Renton* to require pre-enactment evidence, and every one of these circuits has insisted upon such evidence before affirming the constitutionality of a restrictive zoning ordinance.

See Appendix A at 57a-58a.

Concluding his dissent, Judge Rosenn said:

> . . . the effects of adult entertainment establishments are so open and notorious that requiring legislative bodies to consult studies or other evidence confirming their deleterious impact may seem unnecessarily burdensome — just another hoop to jump through in the process of law making. However, this requirement is not without purpose. It limits the risk that legislatures will impose restrictions of speech activities on the basis

> of supposed secondary effects that on close scrutiny lack any evidentiary support, and it lends support to the representation that the content-neutral interests articulated by the law making body was not merely pretextual and illicitly designed to suppress speech expression, even that constitutionally protected . . .

See Appendix A at 59a.

The dissent would have held that the ordinance violated the First Amendment, struck it down and remanded the case to the District Court to consider Phillips' and Vitale's request for damages. *See* Appendix A at 60a.

REASONS FOR GRANTING THE WRIT

The petitioners respectfully submit that compelling reasons exist to warrant this Court granting the Writ of Certiorari. They submit that the United States Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of at least eight other United States Courts of Appeal on the same important matter. Further, they submit that the United States Court of Appeals for the Third Circuit has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

I.

THE ANALYTICAL FRAMEWORK.

The ordinance provisions which are the subject of this litigation are not ones of general applicability whose application only incidentally affects a speech-related activity. Rather, they

apply specifically to theaters, book and video stores. Further, they are content-specific — they do not apply to *all* theaters, book and video stores — they apply only to those which offer adult fare.

When the State singles out a speech-related activity, and further culls out a smaller group for regulation on the basis of the content of their speech, that differential treatment, unless justified by some special characteristic of the speech-related activity, suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional. *Minneapolis Star & Tribune v. Minn. Com'r of Rev.*, 460 U.S. 575, 585 (1983). *See also Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 536 (1980) (constitutionally permissible time, place or manner restriction cannot be based upon the content or subject matter of speech). And *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

If, however, the regulating authority is able to demonstrate that the "predominate concern" of its content-based regulation is some "secondary effect" of the speech-related activity, the regulation may be sustainable as a reasonable time, place or manner restriction. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (City Council's predominate concerns were with the secondary effects of adult theaters, not with the content of adult films themselves); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71-72, 80 (1976) (regulation nothing more than a limitation on the place where adult films may be exhibited; clear that Detroit has not embarked on an effort to suppress free expression).

Throughout the analytical process, a substantial burden rests upon the State which would limit First Amendment rights to justify its regulation. *Young v. American Mini Theaters, Inc.*,

427 U.S. 50, 76 (1976). And *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986) (resolution of case largely dictated by decision in *Young v. American Mini Theaters, Inc.*) The regulating authority is not favored, in the analysis, with any presumption of validity of its restriction of First Amendment rights. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (1981) (presumption of validity carries little, if any, weight where regulation infringes on rights of expression protected under First Amendment); *Thomas v. Collins*, 323 U.S. 516, 640 (1945), *reh. den.*, 323 U.S. 819 (1945) (usual presumptions supporting legislation balanced by preferred place given to freedom secured by First Amendment).

Accordingly, the State may not simply rely upon a statement of legislative purpose. Instead, the State must be prepared to ". . . articulate, and support, a reasoned and significant basis for its decision" to regulate. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (1981); *Mitchell v. Comm'n on Adult Entertainment Est.*, 10 F.3d 123, 132 (3rd Cir. 1993). *See also Lucas v. So. Carolina Coastal Council*, __ U.S. __, 120 L. Ed. 798, 819 n.2 (1992). In reviewing regulations of South Carolina to determine whether they amounted to a "taking" requiring compensation, the Court considered the argument that all the legislature need do is to recite a harm-preventing justification for its action. Justice Scalia, writing for the Court observed:

> Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

II.

MEETING THE BURDEN: THE REQUIREMENT OF AN ADEQUATE FACTUAL BASIS.

If a speech-specific or content-specific law regulates the time, place or manner of the expressive activity, to determine its validity, a threshold determination must be made. As one court observed:

> *Renton* establishes a three-step analysis to be applied to [content based] ordinances. We must first determine whether the ordinance is a "time, place and manner regulation." [citation omitted] If it is, we must then determine whether it is content-neutral or content-based. *Id.* If we decide that the ordinance is content-neutral, we must then determine whether the proposed ordinance "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." [citation omitted]; see also *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334-35 (9th Cir. 1986) (*Walnut*) (stating that *Renton* requires a court first to determine predominant purpose of ordinance before assessing its validity as a content-neutral time, place and manner regulation).

Tollis, Inc. v. San Bernadino County, 827 F.2d 1329, 1332 (9th Cir. 1987).[4]

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4. And *see Mitchell v. Comm'n on Adult Entertainment Est.*, 10 F.3d 123, 133 (3rd Cir. 1993) (whether asserted government interest is proper (Cont'd)

III.

ABSENT AN ADEQUATE FACTUAL BASIS *IN THE LEGISLATIVE RECORD*, KEYPORT'S ORDINANCE REGULATING SEXUALLY ORIENTED BUSINESSES IS PRESUMPTIVELY UNCONSTITUTIONAL.

It is clear that *Renton* ". . . requires the legislative body to *rely* upon the evidence of incidental adverse social effect that provides the important governmental interest justifying [the ordinance]." *Mitchell v. Commission on Adult Entertainment Est.*, 10 F.3d at 133. However, the record in this case is absolutely devoid of any indication that the Borough relied on any pre-enactment evidence of adverse effects relative to adult entertainment uses. The preamble to the ordinance makes no reference to any such evidence — it merely states bald conclusions that adult entertainment uses "are recognized as having serious objectionable operational characteristics . . .", "create and promote a deleterious effect on the Borough's neighborhood characteristics, administration of schools, and the commercial and economic viability of the community . . ." and "conflict with the intent of the Borough Master Plan . . . [providing] that a primary zoning objective is to preserve and protest [sic] existing residential areas . . ."

(Cont'd)

and adequately supported is usually analyzed in terms of whether enactment is narrowly tailored to achieve the interest); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1273-1274 (5th Cir. 1988) (court first satisfied itself that findings of Houston council as to secondary effects of sexually oriented business were sufficient to justify conclusion that City's predominant concern was with secondary effects and not content of expression itself; then turned to test constitutionality of ordinance by time, place and manner of its regulation); *Envy Ltd. v. City of Louisville*, 734 F. Supp. 785, 789 (W.D. Ky. 1990) ("objective evidence of purpose through studies or findings prevents the City from masking a regulation of content by an apparent regulation of secondary effect.")

The Circuit Court agreed with Phillips and Vitale that the District Court should be reversed with respect to its First Amendment — factual basis claim. The District Court had sustained the constitutionality of an ordinance which substantially burdened the exercise of protected speech without an identification by the Borough of the supposed secondary effects alleged to justify the burden on expression. Nor was there any record supporting the reasonableness of any legislative expectations regarding the likelihood of those secondary effects and the ameliorative effect of the ordinance. *See* Appendix A at 17a. The Circuit Court reversed, but it refused to go quite so far as Phillips and Vitale would have it go — it declined to hold that (a) the Borough must have identified the interests sought to be served by the ordinance; (b) the Borough must have considered evidence from which it could have reasonably concluded undesirable secondary effects would occur in the absence of legislative action and that the particular action taken was narrowly tailored to ameliorate those secondary effects and, (c) further, that identification and evidence must be in the legislative record leading to the adoption of the ordinance. *See* Appendix A at 28a-31a.

The Court of Appeals premised its determination, in part, on a misconception. It said

> . . . most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures . . . [W]e believe that insistence on the creation of a legislative record is unwarranted intrusion into the internal affairs of the legislative branch of governments.

See Appendix A at 29a.

In point of fact, New Jersey statutes and Keyport's own land use ordinances *require* hearings to be held and a legislative record to be made before the adoption of zoning ordinances. With respect to ordinances generally, N.J.S.A. 40:49-2 mandates that every ordinance to be introduced must be given a first reading as well as published in a newspaper circulated in the municipality at least one week prior to the time fixed for further consideration before final passage. Consideration for final passage is required to be at least ten days after the first reading at a public meeting at which residents of the municipality and any other person affected by the ordinance may ask pertinent questions concerning the ordinance.

With respect to zoning ordinances in particular, N.J.S.A. 40:55D-26a provides:

> Prior to the adoption of a development regulation, revision or amendment thereto, the Planning Board *shall* make and transmit to the governing body, within 35 days after referral a report including identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the Board deems appropriate. The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the Planning Board and may disapprove or change any recommendation by a vote of the majority of the full authorized membership and shall record in its minutes the reasons for not following such recommendation . . .

And *see* Ord. 2-7.3 establishing a Planning Board in the Borough of Keyport.

Where a municipal governing body which adopts a zoning ordinance is *required* by state statutes and its own ordinances to ". . . hold hearings and compile legislative records before acting on proposed legislative measures . . ." it is little to ask that the governing body articulate the interests sought to be served by the zoning ordinance which is content-based and substantially restricts free expression. Further, it is hardly an imposition on the governing body in these circumstances to require it to include in the legislative record an adequate factual basis for its supposed conclusion that the ordinance is narrowly drawn to serve a substantial government interest unrelated to the suppression of expression.

The purpose and necessity for a contemporaneous record was explained by a New Jersey court in a very similar context. New Jersey's Municipal Land Use Law requires that a zoning ordinance which is inconsistent with the municipality's master plan be accompanied by a resolution giving the reason for the inconsistency.[5] On reviewing a challenge to such an inconsistent ordinance, the court said:

> Plainly read, the statute requires that the reasons for inconsistency be established when the inconsistent ordinance is adopted. In the instant case, this was not done. Defendants contend this substantially complies with the statutory requirement. The reasons have been clearly expressed and exposed to public view. If they do not satisfy

5. The requirement is closely similar to that of N.J.S.A. 40:55D-26a with respect to a governing body's disapproval of a Planning Board recommendation. *See infra*, p. 20.

> the statutory criteria, they are available for judicial review. They argue that the failure of contemporaneous passage was no more than a procedural defect, easily cured without adversely affecting the good purposes of the statute.
>
> We disagree. The purpose of the reason resolutions is to inhibit inconsistency while preserving flexibility. By requiring contemporaneous passage, the law not only provides an avenue for public scrutiny of the action (including a record for judicial review) but, perhaps more importantly, ensures that the inconsistency is clearly recognized and rationalized *when the action is taken*. There is a significant difference between contemporaneous debate and *post hoc* rationalization. [Footnote omitted.]

If the New Jersey Legislature saw fit to require a municipality to contemporaneously record its justifications for the adoption of a zoning ordinance which is inconsistent with its master plan (or the recommendations of a Planning Board), can it be that it is "an unwarranted intrusion into the internal affairs of the legislative branch of governments" for the courts to require a similar contemporaneous record by a municipality that adopts a zoning ordinance which is inconsistent with the Constitution's free speech guarantee?

Moreover, as the dissent so aptly points out, the Court of Appeals' determination is in considerable tension if not outright variance with at least eight other circuit courts of appeal. It appears that if the same issue were squarely presented to the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh

Circuits, all eight circuits would agree with the dissent.[6] The Borough's identification of its interest and its evidentiary justification *must* appear in the legislative record leading to the adoption of an ordinance — especially a content-based ordinance — which is restrictive of free speech rights.

The Circuit Court's decision is not only in conflict with every other circuit court that appears to have addressed similar contentions — it also appears to be in conflict with the decisions

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6. "2. *National Amusements, Inc. v. Dedham*, 43 F.3d 731, 742 (1st Cir.) (stating that a legislative body may rely on whatever pre-enactment evidence it considers to be relevant), *cert. denied*, 115 S. Ct. 2247 (1995); *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415, 1421-23 (4th Cir. 1989) (finding pre-enactment evidence of secondary effect 'sufficient under *Renton* to withstand a constitutional challenge'), *vacated on other grounds*, 496 U.S. 901 (1990); *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988) ('We are persuaded that the City met its burden under *City of Renton* to establish that there was evidence before it from which the Council was entitled to reach its conclusion . . .'), *cert. denied*, 489 U.S. 1052 (1989); *Christy v. Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987) ('Although both the Supreme Court in *Renton* and the Sixth Circuit . . . have stated that a city need not conduct new independent studies to justify adult business zoning ordinances, both courts have required some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses'), *cert. denied*, 484 U.S. 1059 (1988); *Berg v. Health & Hosp. Corp.*, 865 F.2d 797, 803-04 (7th Cir. 1989) (detailing the pre-enactment evidence and testimony upon which governmental body relied); *Postscript Enter. v. Bridgeton*, 905 F.2d 223, 227 (8th Cir. 1990) (upholding an ordinance after determining that the city council's pre-enactment findings were adequate); *Tollis Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) ('The County must show that in enacting the particular limitations . . . it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects'); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1163 (11th Cir. 1991) (noting that Broward County had relied on the experiences of Detroit in enacting its ordinance), *cert. denied*, 503 U.S. 920 (1992)." Appendix A at 57a, n.2.

of this Court respecting the analysis of legislative enactments which infringe on constitutional rights. As noted earlier, this Court, in its *Renton* decision said:

> [t]he First Amendment does not require a city, before enacting [an adult use] ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*

Renton, 475 U.S. at 51-52 (emphasis added). It appears then that it is implicitly assumed in this Court's *Renton* decision that a legislative body must not only identify the interest sought to be served by an enactment restrictive of speech and articulate a reasoned and significant basis for its legislative action, it must do that *before* it acts and the objective and evidence on which the Legislature relies should appear in the legislative record leading to the enactment. The reason is obvious and was plainly articulated by Justice Powell in *Renton's* predecessor:

> [C]ourts must be alert to the possibility of direct rather than incidental effect of zoning on expression, *and especially to the possibility of using the power to zone as a pretext for suppressing expression . . .*

(Emphasis supplied). *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (concurring opinion of Powell, J.) *See also Bakke v. Bd. of Regents*, 438 U.S. 265, 320 n.54 (1978) (A permissible reason for discrimination predicated on race cannot be conjured up at a later date but must be one on which the Board actually acted); *Friedman v. Board of County Com'rs*

of Bernalillo, 781 F.2d 777, 780 (10th Cir. 1985), *citing Wallace v. Jaffree*, 472 U.S. 38 (1985) ("[A]ll courts must be wary of accepting after-the-fact justifications by government officials in lieu of genuinely considered and recorded reasons for actions challenged on Establishment Clause grounds. We must be vigilant to distinguish between sham and sincere purposes.")

That a contemporaneous record of justification is required seems to have been made all the more clear by this Court's more recent decision in *Turner Broadcasting System v. FCC*, 520 U.S. __, 137 L. Ed. 2d 369 (1997). In reviewing the "must carry" provisions of the Cable Television Consumer Protection & Competition Act of 1992, the Court said:

> Our sole obligation [as a reviewing court] is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences *based on substantial evidence*." . . . Even in the realm of First Amendment questions where *Congress must base its conclusions upon substantial evidence*, deference must be accorded to its findings as to harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

(Emphasis supplied). *Id.* at 391, 392.

The majority characterized the issue before it as:

> . . . whether, given conflicting views of the probable development of the television industry, *Congress had substantial evidence* for making the judgment that it did . . .

> . . . [T]he question *is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress.*

(Emphasis supplied). *Id.* at 399, 401.

It appears, then, that this Court has made it plain that, when reviewing a legislative enactment restrictive of free speech rights, the Court will insist upon an articulation of the legislative body's purpose and substantial evidence that supports the Legislature's conclusions *in the legislative record* leading the adoption of the enactment. As the Borough's legislative record reveals no articulation of the ordinance's purpose or any facts to suggest its necessity or that it is narrowly tailored and since the ordinance substantially burdens free speech rights, the appellants submit that United States Supreme Court precedent requires it to be struck down.

CONCLUSION

For the foregoing reasons and predicated on the foregoing authorities, the undersigned, on behalf of petitioners, George Phillips and Philip Vitale, respectfully request this Court to reverse the decision of the United States Circuit Court of Appeals for the Third Circuit; to hold that the Borough's ordinance No. 39-92 does violate the First Amendment, strike it down and remand the case to the District Court to enter judgment in favor of the petitioners on their First Amendment — factual basis claim and to conduct further proceedings consistent with this Court's opinion to include consideration of the petitioners' request for damages, counsel fees and costs.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5143

GEORGE PHILLIPS; PHILIP VITALE

Appellants

v.

BOROUGH OF KEYPORT; VICTOR RHODES; BOARD OF ADJUSTMENT

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 93-cv-00415)

Argued December 8, 1995

BEFORE: STAPLETON, SAROKIN,* and ROSENN,
Circuit Judges

Reargued En Banc
September 19, 1996

BEFORE: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and ROSENN,
Circuit Judges

(Opinion Filed February 21, 1997)

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* Hon. H. Lee Sarokin heard argument before the original panel but retired from office prior to the *en banc* hearing.

Appendix A

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Appellants planned to open an adult book and video store, "X-Tasy", in the Borough of Keyport, New Jersey. Over a ten month period, they sought the necessary zoning and construction permits. Their applications were ultimately denied

on the basis of an "adult entertainment uses" ordinance enacted by the Borough allegedly in response to those applications. Appellants insist that delays, denials, and revocations in the permitting process violated their right to substantive due process, that the ordinance violates their right to freedom of speech, and that they are entitled to recover litigation expenses under 42 U.S.C. § 1988. Appellants also contend that the Borough is equitably estopped to deny that they are authorized to pursue their project.

I. *The Factual Background*

In early 1992, George Phillips and Philip Vitale spotted an abandoned one-story building on Route 36 in the Borough of Keyport, a 1.5-square-mile community in Monmouth County, New Jersey. After visiting the site, they became interested in the property as a potential location for an adult video and book store. After checking zoning and land use regulations, they met with the owner to negotiate a lease of the property. The parties agreed that, if Phillips and Vitale could obtain a zoning permit for the intended use of the property, they would execute a lease.

Phillips contacted Vic Rhodes, construction official and zoning officer of the Borough, and asked him to perform an unofficial inspection of the property to advise plaintiffs as to what they would need in order to obtain a certificate of occupancy. He did so on February 18th, and informed Phillips and Vitale that they would have to comply with various requirements regarding designation of parking places. A week later, Phillips and Vitale submitted to Rhodes an application for a zoning permit to "operate a retail book store w/ novelties — amusements & videos." App. at 29. The address listed on the application was "#65 Hwy. 36." *Id.* The line below the address

specified, "Block 103, Lot 59." *Id.* Attached to the application was a survey of "Lots 59 & 61, Block 103 of the Official Tax Map of the Borough of Keyport." App. at 30.

The property that Phillips and Vitale eventually leased — and that Rhodes inspected — is actually located on Lot 61. While Lots 59 and 61 are contiguous, they are situated in different zoning areas. Lot 59 is located in a district zoned as "residential." Lot 61 is situated in a "highway commercial" district. The survey clearly indicated which land was Lot 59 and which was Lot 61.

A few days later, Rhodes telephoned Vitale and requested that he clarify the nature of plaintiffs' intended use of the property. Vitale complied by describing the intended use in writing as "(1) video sales & rentals"; "(2) amusements — adult video arcade"; and "(3) no one under 21 years of age admitted." App. at 31. There was at that time no zoning restriction specifically pertaining to commercial establishments selling, renting or exhibiting sexually explicit material. On March 9th, Rhodes issued to plaintiffs a zoning permit for Block 103, Lot 59.

On March 13th, Phillips and Vitale entered into a five-year lease for "[t]hat portion of the premises known as Block 103, Lot 59 also known as 65 Highway 36." App. at 32. The lease specified that the premises were to be used for "video sales and rental, amusements and adult video arcade" and as "a retail adult book store with novelties and gifts," and that "[n]o one under 21 years of age [would be] admitted to the premises." The lessees agreed to "obtain any and all necessary government permits and approvals to conduct the business as deemed necessary by such governmental entities."

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On March 18th, Rhodes issued plaintiffs three construction permits under their zoning permit. Plaintiffs allege that they thereafter expended substantial sums of money to repair and renovate the property for their intended use.

By this time, however, word of the plans for an adult book store had spread around the Borough and had generated significant opposition. Charles Barreca, who lives directly behind the property at issue, stated at a Borough Council meeting on March 23rd that he would do all he could to stop plaintiffs from opening their proposed store and that he had begun to circulate a petition in the area to that end. At the same meeting, the Borough attorney explained that the Zoning Board of Adjustment could review and overturn Rhodes's decision to issue the zoning permit. Other local leaders, including the mayor, also voiced their opposition. Faithful to his promise, on March 29th, Barreca appealed the issuance of the zoning permit to the Board, and the Board announced that it would review the matter at its upcoming meeting, on April 20th. On April 2nd, Rhodes issued and posted a "stop construction" notice, ordering plaintiffs to stop work at "Block 103, Lot 61, 65 Hwy 36" until the appeal was resolved. The appeal was based on the mistaken identification of the lot number.

On April 14th, Phillips and Vitale filed a second application for a zoning permit, this time with the proper address of the location. The application stated that their intention was "to operate a retail bookstore w/ novelties, amusements & videos, adult video arcade, video sales & rentals (no one under 21 years of age admitted)." App. at 42.

On April 20th, the Board of Adjustment held its hearing on the first application. Barreca attended, along with another

resident, to urge reversal. Phillips and Vitale were represented by counsel, who admitted that the permit had been issued for Block 103, Lot 59, that this location was in a residential district, and that his clients' intended use was not permitted in such a district. Barreca and his supporter submitted eight photographs purporting to show that the present condition of the plaintiffs' proposed building and site differed from the conditions represented on the old survey attached to their application for the zoning permit. On the basis of this evidence, the Board granted the appeal and reversed Rhodes's decision to issue the initial zoning permit.

Eight days later, Rhodes advised plaintiffs that their second application for a zoning permit had been denied due to (1) inaccuracies in the survey they had submitted with the application, (2) the need to replace a fence pursuant to Ordinance 25:1-14.6.B, and (3) reports from a previous tenant that the sewer line servicing the building did not operate. Phillips and Vitale undertook to correct the problems and, on June 16th, submitted a third application for a zoning permit, together with a revised survey and receipts for sewer line repairs.

A week later, while the plaintiffs' third application was pending, members of the Borough Council introduced at a Council meeting two ordinances targeted at establishments involved in so-called adult entertainment. Ordinance No. 30-92, entitled "Public Indecency," would prohibit female topless and bottomless exhibitions and male bottomless exhibitions. It was patterned after the Indiana statute upheld by the Supreme Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Ordinance No. 31-92, entitled "Adult Entertainment Uses," ("the Ordinance" or "Ordinance 31-92") would restrict adult entertainment uses to industrial districts and prohibit them within

1000 feet of residential zones, schools, churches, and public playgrounds, swimming pools, parks and libraries. Under the proposed scheme, Phillips and Vitale would need a use variance to open their store, because they were located in a highway commercial district. The Council referred the second ordinance to the Borough Planning Board for review. In connection with the ordinances, Mayor John J. Merla stated to the Asbury Park Press correspondent:

> We're not going to tolerate this kind of filth in the Borough of Keyport. We don't support it (adult entertainment) going into any community in the Bayshore.

App. at 14-15.

On July 23rd, the Borough Planning Board held a public meeting to consider proposed Ordinance No. 31-92. The Board had earlier solicited and reviewed a legal opinion concerning the Ordinance, and at the hearing, it heard an oral presentation by an engineering expert. It recommended that the Council pass the proposed ordinance, but suggested three changes, the most significant of which was to reduce the "buffer zone" from 1000 to 500 feet.

At the Council meeting on July 28th, the Council adopted Ordinance No. 31-92 as amended in light of the Planning Board's suggestions. The minutes of the meeting indicate that, although the meeting was open to the public for comments, the sole comment on Ordinance No. 31-92 was made by the Borough counsel, reporting the Planning Board's recommended changes and stating that the mayor had disqualified himself at the Planning Board meeting. Ordinance No. 31-92 contained the following legislative findings and prohibitions:

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(a) In the development and execution of this section it is recognized that there are certain uses which, because of their very nature, are recognized as having serious objectionable operational characteristics.

These uses create and promote a deleterious effect on the Borough's neighborhood characteristics, administration of schools, and the commercial and economic viability of the community. These uses impact on the Borough's neighborhood areas and conflict with the intent of the Borough Master Plan, particularly those segments listed on pages 16 and 19 therein which provide that a primary zoning objective is to preserve and protest [sic] existing residential areas and to enhance the desirability thereof. Adult Entertainment Uses are such uses.

The Borough of Keyport is a small residential community with its commercial areas and zones highly integrated with its residential properties. The commercial properties are in close proximity to its educational, religious, residential and youth recreation facilities with a high volume of pedestrian activity, including children throughout the area.

The industrial zone as it exists is not comprised of major industrial operations, but of mixed use nature including retail/

commercial uses, it is so situated as to provide easy access and highway exposure. The industrial zone is suitably distant and buffered from the residential and mixed commercial zones as to minimize a negative or deleterious effect.

In order to prevent the deterioration of the community, to preserve the neighborhoods of the Borough of Keyport, to ensure the economic prosperity of the community, and to provide for the protection and well being of the quality of life in the Borough of Keyport, certain regulations are necessary to prevent these adverse effects.

(b) Adult Entertainment Uses[1] are prohibited in all zones, except where expressly permitted.

---

1. Ordinance 31-92 provides the following definition of "Adult Entertainment Uses":

ADULT ENTERTAINMENT USES, INCLUDE:

(1) ADULT BOOKSTORE — An establishment having as a substantial or significant portion of its stock in trade books, magazines, other periodicals, or any tangible items and objects, not necessarily of a reading or photographic nature, which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined below, or an establishment with a segment or section devoted to the sale or display of such material.

(2) ADULT MOTION PICTURE THEATER — An enclosed building with a capacity of fifty (50) or more persons used for presenting material

(Cont'd)

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(c) In such zones where Adult Entertainment Uses are expressly permitted, no Adult Entertainment Use shall be located:

(a) within 500 feet of any residence, residential use and/or residential zone; or

(b) within 500 feet of any of the following users:

(Cont'd)
distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined below, for observation by patrons therein.

(3) ADULT MINI MOTION PICTURE THEATER — An enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined below, for observation by patrons therein.

(a) For the purpose of this subsection, "specified sexual activities" is defined as human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse or sodomy; and fondling or other erotic touching of human genitals, pubic region, buttock or female breast; and "specified anatomical areas" is defined as less than completely and opaquely covered human genitals, pubic region, buttock or female breast below a point immediately above the top of the areola; and human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(4) CABARET — An establishment which features go-go dancers, exotic dancers, strippers, or similar entertainers. App. at 57-58 (codified at Keyport, N.J., Rev. Gen. Code, ch. XXV, § 25:1-3(a) (1992)).

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> 1. Churches, monasteries, chapels, synagogues, convents, rectories, religious artifice or religious apparel stores, or any religious use; or
>
> 2. Schools, up to and including the twelfth (12) grade, and their adjunct play areas; or
>
> 3. Public playgrounds, public swimming pools, public parks and public libraries.

App. at 59 (codified at Keyport, N.J., Rev. Gen Code, ch. XXV, § 25:1-15.15 (1992)).

On September 9th, Rhodes informed Phillips and Vitale by letter that their third application for a zoning permit was denied because: (1) they lacked "ample parking," (2) a site plan was required, and (3) issuance of the permit sought would be inconsistent with "31-92 Section 2 25:1-15.15.b Adult Entertainment Uses." App. at 70. Phillips and Vitale appealed the denial, and the Board of Adjustment held public hearings on the appeal. On December 21st, a unanimous Board voted to deny the appeal, finding that plaintiffs' proposed use fell within the definition of Adult Entertainment Uses and that such uses were prohibited in a highway commercial district, where plaintiffs' site was located. The Board also found that plaintiffs had failed to demonstrate that Rhodes erred regarding the issues of inadequate parking and the need for a site plan. Phillips and Vitale then instituted this suit.

Appendix A

II. *The Issues On Appeal And The District Court Process*

In this appeal, Phillips and Vitale advance four arguments: (1) Ordinance No. 31-92 violates their right of free expression because it is not narrowly tailored to achieve a substantial, content-neutral governmental interest and because it does not leave adequate alternative channels of communication; (2) the Borough violated their right to substantive due process by revoking their original permits, by delaying action on their two subsequent applications, and by denying their third application based on Ordinance No. 31-92; (3) they are "prevailing parties" entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and (4) the Borough is equitably estopped from revoking their original permits.

In response to the complaint, Rhodes and the Borough filed a motion to dismiss rather than an answer.[2] The district court denied their motion. In the course of doing so, the court ruled on the basis of the allegations of the complaint that Ordinance No. 31-92 is content neutral and serves a substantial state interest. The only governmental interests identified by the district court were "preserving the quality of urban life" and "shielding minors from sexually explicit materials" — interests quoted not from the Ordinance or the record but from Supreme Court cases. App. at 140-41. *See Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) ("[I]nterest in attempting to preserve the quality of urban life is one that must be accorded high respect."); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (state's "interest in the well-

2. The Board of Adjustment filed a motion to dismiss and, later, an answer to the complaint. This answer consisted primarily of general denials and did not identify any secondary effects that might justify Ordinance 31-92.

being of its youth" justified some restriction of the First Amendment). The court declined to grant the motion to dismiss, however, because it was unclear from the complaint and exhibits (a) whether the Ordinance provided alternative channels for adult entertainment expression, and (b) whether the Borough was equitably estopped from prohibiting the plaintiffs' proposed use. It did hold that the complaint failed to state a substantive due process claim and dismissed that count of the complaint.

The district court thereafter entertained the plaintiffs' motion for summary judgment on their challenge to Ordinance No. 31-92 and their motion for a preliminary injunction barring enforcement of that Ordinance. On June 15, 1994, the district court conducted an evidentiary hearing on the issue of whether Ordinance 31-92 left alternative channels available for adult entertainment. A second evidentiary hearing was held two days later to receive evidence on the equitable estoppel issue. At the beginning of this hearing, defense counsel announced that the Borough Council had met in special session on the evening of June 15, 1994, and had declared an intention to amend the Ordinance to reduce the buffer from 500 feet to 300 feet.

Both motions were ultimately denied. The district court viewed the record as establishing that the Ordinance, as amended to reduce the buffer zone to 300 feet, afforded a constitutionally sufficient opportunity for adult entertainment expression. This finding, together with the conclusions reached in deciding the motion to dismiss, meant that Ordinance No. 31-92 was constitutional and that plaintiffs could not demonstrate a likelihood of success on this claim. The court expressed no view regarding the constitutionality of the 500 foot buffer version of the Ordinance.

The district court's third and final order came in response to the plaintiffs' motion for summary judgment on their equitable estoppel and § 1988 claims. The district court first ruled that the undisputed record facts established a lack of reasonable reliance by the plaintiffs. The district court then found that the plaintiffs were not "prevailing parties" within the meaning of § 1988. The resulting order denied plaintiffs' motion for summary judgment and concluded as follows:

> FURTHER ORDERED that since there remain no issues of material fact and this Court having resolved all legal issues in defendants' favor, that the above-captioned action be and is hereby DISMISSED in its ENTIRETY as MOOT.

Order of Feb. 14. 1994, App. at 247.

III. *The Challenge to Ordinance No. 31-92*

Speech, be it in the form of film, live presentations, or printed matter, that is sexually explicit in content but not "obscene" is protected under the First Amendment. *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 65-66 (1981); *Mitchell v. Comm'n on Adult Entertainment Establishments,* 10 F.3d 123, 130 (3d Cir. 1993). The Fourteenth Amendment extends this protection to the state and local levels. *44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495, 1514 (1996). However, not every regulation of protected speech violates the First Amendment; nor is every form of speech regulation subject to the same degree of scrutiny when challenged in court. As the Supreme Court explained in *Turner Broadcasting System, Inc. v. F.C.C.,* 114 S. Ct. 2445, 2459 (1994) (citations omitted):

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> Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

State regulations of speech that are not regarded as content neutral will be sustained only if they are shown to serve a compelling state interest in a manner which involves the least possible burden on expression. Regulations of speech that are regarded as content neutral, however, receive "intermediate" rather than this "exacting" or "strict" scrutiny. This includes regulations that restrict the time, place and manner of expression in order to ameliorate undesirable secondary effects of sexually explicit expression. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (zoning ordinances designed to combat the undesirable secondary effects of businesses that purvey sexually explicit material are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations). We articulated the "intermediate scrutiny" standard applicable to such measures in *Mitchell v. Comm'n on Adult Entertainment Establishments*, 10 F.3d 123, 130 (3d Cir. 1993):

> [R]easonable time, place, and manner regulations of protected speech are valid if: (1) they are justified without reference to the content of the regulated speech; (2) they are narrowly tailored to serve a significant or

> substantial government interest; and (3) they leave open ample alternative channels of communication.

Thus, when a legislative body acts to regulate speech, it has the burden, when challenged, of showing either (1) that its action serves a compelling state interest which cannot be served in a less restrictive way, or (2) that its action serves a substantial, content-neutral, state interest, is narrowly tailored to further that substantial state interest, and leaves adequate alternative channels for the regulated speech. If the state chooses the second alternative in a setting like the present one, it must come forward with "evidence of incidental adverse social effect that provides the important governmental interest justifying reasonable time, place and manner restrictions on speech or expressive conduct." *Id.* at 133. Moreover, the legislative body "must . . . be prepared . . . to articulate and support its argument with a reasoned and substantial basis demonstrating the link between the regulation and the asserted governmental interest." *Id.* at 132.

A. *Content Neutrality And Narrow Tailoring*

The district court concluded, on the basis of the legislative findings contained in Ordinance No. 31-92, that the Ordinance is an effort to suppress the secondary effects of sexually explicit expression and not sexually explicit expression itself. Apparently, it further tacitly concluded, without explanation, that Ordinance No. 31-92 was narrowly tailored to achieve that objective. We conclude that the district court was simply not in a position to make these findings.

These findings were made by the district court when the case was in an unusual procedural posture. It sustained the

constitutionality of an ordinance substantially burdening the exercise of protected speech (1) without an answer from the defendants identifying the secondary effects alleged to justify the burden on expression, and (2) without a record supporting the reasonableness of any legislative expectations regarding the likelihood of these secondary effects and the ameliorative effect of the ordinance.

The complaint alleges that the plaintiffs wished to disseminate adult entertainment and that the defendants "applied an unconstitutional ordinance to [them] with a purpose to restrain their sale, rental, exchange and exhibition of adult-theme videos, as well as adult books, magazines and the like because of their content." ¶ 60. It further alleges, *inter alia,* that the ordinance burdens only adult entertainment expression, "is not rationally related to a valid governmental purpose," "is not intended to further any substantial or compelling governmental purpose," "significantly restricts access to protect[ed] speech," "is not supported by a reasoned or significant basis," "is not narrowly tailored," and "is a subterfuge for the suppression of expression protected by the First Amendment." ¶ 61.

When an ordinance burdening speech is thus challenged, it must be "*justified*" by the state. *Renton,* 475 U.S. at 48. However, because the Borough filed no answer in this case, we do not yet know how the Borough will seek to justify the Ordinance. There is no articulation by the state of what it perceives its relevant interests to be and how it thinks they will be served. This is particularly troublesome in a case, like this, where the legislative findings speak in terms of "serious objectionable operational characteristics," "deleterious effects," and "the deterioration of the community" without identifying in any way those "characteristics," those "effects," or that "deterioration."

On remand, the Borough must be required to articulate the governmental interests on the basis of which it seeks to justify the ordinance. It should then have to shoulder the burden of building an evidentiary record that will support a finding that it reasonably believed those interests would be jeopardized in the absence of an ordinance and that this ordinance is reasonably tailored to promote those interests. It is the Borough that carries the burdens of production and persuasion here, not the plaintiffs. *Renton,* 475 U.S. 41; *Schad v. Mount Ephraim,* 452 U.S. 61 (1981). Moreover, it is the district court, not the Borough, that must make the findings necessary to determine whether the ordinance is consistent with the First Amendment. *See id.*; *Renton,* 475 U.S. 41.

It is clear from the district court's opinion that it believed its conclusions to be dictated by *Renton v. Playtime Theatres, Inc.* The Supreme Court there upheld the constitutionality of a municipal ordinance of the City of Renton, Washington, that prohibited any " 'adult motion picture theater' from locating within 1000 feet of any residential zone, . . . dwelling, church, or park, and within one mile of any school." 475 U.S. at 44. Renton is a city of approximately 32,000 people located just south of Seattle. The Court held, *inter alia,* that the Renton Council was entitled to rely "on the experience of, and studies produced by, the City of Seattle," *id.* at 51, concerning the secondary effects of such theaters. As the Court put it, "The First Amendment does not require a city, before enacting an ordinance, to conduct new studies or produce new evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52.

Appendix A

The *Renton* Court did not sustain the constitutionality of the ordinance before it based solely on legislative findings there recited. The city justified the ordinance by placing the Seattle studies in the record and the Court concluded that these studies could reasonably be believed relevant to the problem that the city was facing. Here, the district court had no way of knowing what problem or problems the Borough thought it was facing and there is no study or other evidence in the record concerning the secondary effects of "adult entertainment uses." Moreover, because the problem or problems that the Borough believes it was facing have not been identified, the district court was in no position to determine whether Ordinance 31-92 was "narrowly tailored" to effectively ameliorate the interest or interests the Borough sought to serve. While the requirement of narrow tailoring does not mean that the ordinance must be the least restrictive means of serving the Borough's substantial interests, "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989). Accordingly, the issue of narrow tailoring cannot be determined without knowing the undesirable secondary effects the Borough relies upon to justify its ordinance and more about the effect of Ordinance 31-92 in the context of the Borough of Keyport.

Renton does not signal an abandonment of the elements of the intermediate scrutiny standard that the Supreme Court has traditionally applied to content neutral regulation of speech. *See, e.g., Ward v. Rock Against Racism,* 491 U.S. 781 (1989); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991); *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993); *Turner Broadcasting System, Inc. v. F.C.C.,* 114 S. Ct. 2445 (1994). In *Turner Broadcasting,* the Supreme Court held that a

summary judgment upholding the constitutionality of the FCC's "must carry" provisions for cable stations was improperly granted. The Court was divided on whether the challenged provisions were content neutral and, accordingly, on the level of scrutiny that should be applied. A majority agreed, however, that the challenged provisions would not survive intermediate scrutiny and emphasized the importance of applying the traditional elements of intermediate scrutiny in a realistic manner. Justice Kennedy, joined by the Chief Justice, Blackmun, J., and Souter, J., found the intermediate scrutiny standard articulated in *United States v. O'Brien*, 391 U.S. 367 (1968),[3] to be applicable and observed:

> That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. . . .
>
> Thus, in applying *O'Brien* scrutiny we

3. The Supreme Court has recognized that the "*O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place and manner restrictions' " like those found in *Renton* and *Mitchell*. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1959).

> must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward,* 491 U.S., at 799, 109 S. Ct., at 2758. On the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied either inquiry.

Turner, 114 S. Ct. at 2470. Justice O'Connor, joined by Scalia, J., and Ginsburg, J., found that the "must carry" rules were not content neutral but agreed that they "fail[ed even] content neutral scrutiny" because:

> "A regulation is not 'narrowly tailored' — even under the more lenient [standard applicable to content-neutral restrictions] — where . . . a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." *Simon & Schuster,* 502 U.S., at __ - __, n.** 112 S. Ct., at 511-512, n.**. . . .

Turner, 114 S. Ct. at 2479.

Appendix A

It may well be that the defendants here, by pointing to studies from other towns and to other evidence of legislative facts, will be able to carry their burden of showing that the ordinance is reasonably designed to address the reasonably foreseeable secondary effect problems. Nevertheless, our First Amendment jurisprudence requires that the Borough identify the justifying secondary effects with some particularity, that they offer some record support for the existence of those effects and for the Ordinance's amelioration thereof, and that the plaintiffs be afforded some opportunity to offer evidence in support of the allegations of their complaint. To insist on less is to reduce the First Amendment to a charade in this area.

B. *The Adequacy of Alternative Channels*

Ordinance 31-92, as originally proposed by the Borough Council, prohibited adult entertainment uses located on any land not zoned industrial or in a "buffer zone" — i.e., less than 1000 feet from a residence or residential zone, school, church, etc. As a result of advice from the Planning Board's engineer that a 1000 foot buffer would leave no land available for an adult bookstore, the Ordinance, as ultimately adopted, called for a 500 foot buffer zone.

At the September 15, 1993, evidentiary hearing, the plaintiffs' expert land use planner, George A. VanSant, testified that the 500 foot version of the ordinance prohibited an adult video store anywhere in the Borough. He tendered a map that depicted the portions of Keyport zoned industrial with superimposed arcs marking 500 feet from each residential property in Keyport and adjacent areas. With respect to the buffers associated with residential properties in adjacent areas, VanSant explained that the Borough's zoning plan had been

coordinated with the zoning plans of the contiguous townships and that the buffer provisions of the Ordinance, interpreted in the context of the Borough's zoning ordinance, had to be applied to residential property in contiguous areas.[4] VanSant's map demonstrated that the 500 foot buffer left only a portion of two lots available for an adult bookstore. One of these lots was owned by Jersey Central Power & Light Company and was used as an electric substation. The other was owned and occupied by a going industrial concern. VanSant indicated that even if one of these owners could be persuaded to sell or lease, however, neither lot could be used for an adult bookstore because the Borough's zoning ordinance, in accordance with customary zoning practice, defined "use" in such a way that the entirety of each lot takes on the character of the purpose for which any building thereon is utilized. Thus, the placing of an adult bookstore anywhere on either of these lots would result in a prohibited use within 500 feet of a residential area.

In response to this testimony, the defendants called the Borough's Planning Board engineer, Paul M. Sterbenz. He testified that the intent of the 500 foot ordinance was to leave

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4. The Supreme Court has suggested that, at least in the case of small municipalities, opportunities to engage in the restricted speech in neighboring communities may be relevant to a determination of the adequate alternative channels. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981). In *Schad*, Mount Ephraim, another New Jersey borough, attempted to ban "live entertainment," including nude dancing, within the borough's boundaries. Mount Ephraim asserted that nude dancing was "amply available in close-by areas" within the county. *Id.* at 76. Nevertheless, the Court concluded that Mount Ephraim could not avail itself of such an argument as there were no county-wide zoning nor any evidence of the availability of nude dancing in "reasonably nearby areas." *Id.* Here, the Borough does not rely on the availability of "adult entertainment" sites in neighboring areas outside its limits; nor has it offered any evidence of such sites.

four lots in the industrial zone available for an adult bookstore. He acknowledged, however, that when he reviewed the 500 foot version for the Planing Board he had inadvertently failed to take into account a residential area in adjacent Hazlet Township. He further acknowledged that when this error was corrected only a portion of two lots were available for an adult bookstore. Finally, on cross-examination, Sterbenz agreed with VanSant's view that for zoning purposes in the Borough a lot takes on the character of the use to which any portion thereof is put.

Despite this last concession, the defendants' counsel continued to insist that a portion of two lots could be used for an adult bookstore. In support of this position, they called Richard Maser, the Borough Engineer for the Borough of Keyport. He expressed the opinion that an adult bookstore could be constructed on the portion of the two lots that lay outside the 500 foot buffer so long as other set back requirements were met. He did not explain the basis for this opinion, however, and did not comment on VanSant's and Sterbenz's understanding of "use." In response to a question from defense counsel, Maser expressed the further opinion that the Council's original intention of leaving four lots available for an adult bookstore could be accomplished by reducing the buffer zone to 250 feet.

On the evening of June 15th, after the close of the hearing, the Borough Council held a special meeting and adopted a resolution declaring its intention to reduce the buffer zone to 300 feet. It recognized that it could not legally effect the change before the scheduled hearing on September 17th but authorized counsel to advise the court of its intent and to indicate that it considered itself bound to effectuate the change.

Appendix A

At the beginning of the June 17th hearing on the equitable estoppel issue, defense counsel advised the court of the Council's resolution and declared that the amendment would make three lots in their entirety available for an adult entertainment use. He further indicated that a portion of a fourth lot would be available. The resolution was marked as an exhibit. Although the transcript does not affirmatively indicate whether it was formally admitted into evidence, the court and counsel explored the effect of the new ordinance on the map exhibits. The court clearly indicated that it was considering the resolution as a part of the evidence in the case and that it considered the Borough bound by it. Counsel for Phillips and Vitale did not at any time object to consideration of the resolution by the court and concluded his closing argument on the issue of alternative access with the following comments concerning three "available" lots:

> There is land that's legally available. It's occupied by a quasi public entity [and a] manufacturing concern that we can expect that it's going to stay right there, and it's occupied by lot 4, which is basically — probably a non-buildable ravine, that's it. And I'd submit that when we measure what the Borough has done against what the Supreme Court would permit, and permitted in *Young* [*v. American Theatres*] and *City of Rentin* [sic], that it has substantially restricted access and that it is unconstitutional.

Tr. at 203.

As we have indicated, the district court upheld the constitutionality of the 300 foot Ordinance. It did not comment

upon the constitutionality of the 500 foot Ordinance. In this appeal, Phillips and Vitale do not argue that the 300 foot ordinance fails to provide constitutionally sufficient alternative channels of expression for adult entertainment. They do insist that the district court erred in failing to rule upon the constitutionality of the 500 foot Ordinance. They also contend that the 300 foot Ordinance was not properly before the district court and, alternatively, that it violates the First Amendment, even assuming that it leaves constitutionally sufficient alternative channels of expression for adult entertainment.

We agree with Phillips and Vitale that the district court erred in failing to adjudicate their § 1983 claim that the 500 foot version of Ordinance 31-92 violated their First Amendment rights. As we have pointed out, the defendants have not tendered record justification for the Ordinance tending to establish that it is narrowly tailored to serve a substantial state interest and the evidence from the June 15, 1993, hearing would provide ample basis for concluding that this version of the Ordinance leaves no alternative channel open for adult entertainment expression. Contrary to the defendants' suggestion, the issue of the constitutionality of this version of the Ordinance is not moot. Phillips and Vitale have a § 1983 damage claim based on the 500 foot version of the Ordinance. They seek damages for defendants' refusal to permit them to operate an adult bookstore on Lot 61 from July 28, 1992, when Ordinance 31-92 was first adopted, to the date in the fall of 1993 on which the 300 foot version of the Ordinance was adopted. If the 500 foot Ordinance is unconstitutional, Phillips and Vitale are entitled to any damages they can establish to have been occasioned by it.

As *Renton*, 475 U.S. 41, 53-54, and *Mitchell*, 10 F.3d 123, 139, 144, indicate, the existence of adequate alternative channels

for adult entertainment expression is an essential element for the state to satisfy when it relies upon its authority to adopt time, place, and manner regulations.[5] It follows that, on remand, the district court must rule on whether the 500 foot version of the Ordinance left adequate alternative channels for adult entertainment expression. If the 500 foot version of the Ordinance did not provide adequate alternative channels, the district court should determine what, if any, damages Phillips and Vitale suffered as a result of the adoption of that version of the Ordinance.

Turning to the 300 foot Ordinance, we agree with the defendants that Phillips and Vitale waived their right to complain about the district court's considering that version of the Ordinance. The record of the June 17th hearing clearly establishes that the district court considered the defendants bound by Council's September 15th resolution and that it intended to consider the 300 foot version of the statute in connection with the plaintiffs' request for injunctive relief. Plaintiffs' counsel not only failed to object to consideration of that Ordinance, but also assisted the court in understanding its effect on the evidence produced at the September 15th hearing and made a closing argument premised on its adoption.

On remand, the district court will be required to adjudicate the constitutionality of the 300 foot version of the Ordinance in order to determine Phillips' and Vitale's entitlement to an injunction and to damages arising after its adoption. Since Phillips and Vitale chose not to appeal from the district court's determination that this version leaves adequate alternative

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5. The defendants have relied entirely on the authority of the Borough to adopt content-neutral time, place, and manner regulations and have not claimed that Ordinance 31-92 can pass muster under strict scrutiny review.

channels for adult expression, the district court need not relitigate that issue in making these determinations.

C. *The Necessity of the Presentation of Pre-Enactment Evidence*

While we thus agree with appellants that they are entitled to a reversal of the judgment against them on their First Amendment claim, we reject their argument that they are entitled to a mandate requiring the entry of a judgment in their favor on this claim. Phillips and Vitale read *Renton* and our decision in *Mitchell* as endorsing a *per se* rule that any governmental regulation of speech is invalid if the adopting entity did not have before it, at the time of adoption, evidence supporting the constitutionality of the action taken. Thus, in appellants' view, a governmental entity may successfully defend a First Amendment challenge of the kind here mounted only if it can show that it was exposed, before taking action, to evidence from which one could reasonably conclude that undesirable secondary effects would occur in the absence of legislative action and that the particular action taken was narrowly tailored to ameliorate those secondary effects. We find no such rule in *Renton*, *Mitchell*, or any other governing precedent.

There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure. We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter

of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures. We perceive no justification in policy or doctrine for abandoning our traditional approach. Moreover, we believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of governments.

If a legislative body can produce in court whatever justification is required of it under the applicable constitutional doctrine, we perceive little to be gained by incurring the expense, effort, and delay involved in requiring it to reenact the legislative measure after parading its evidence through its legislative chamber. A record like that presented to the town council in *Renton* can be easily and quickly assembled, and a requirement that this be done is unlikely to deter any municipal body bent on regulating or curbing speech. While we agree with appellants that the creation of a legislative record can have probative value on what the lawmakers had in mind when they acted, we do not understand why its absence should be controlling when the court is otherwise satisfied that the legislative measure has a content-neutral target.

The Supreme Court's *Renton* case and our *Mitchell* case *sustained* the constitutionality of the ordinances before them. *Renton*, 475 U.S. at 54-55; *Mitchell*, 10 F.3d at 144. Thus, they clearly cannot stand for the proposition that a legislative record is a constitutional prerequisite to validity.[6] Moreover, in

6. Most of the cases cited by the dissent upheld the ordinances at issue, and, just as *Renton* and *Mitchell*, cannot stand for the principle that the lack (Cont'd)

Mitchell, we expressly reserved this issue, observing that it was "unnecessary . . . to reach or decide whether . . . a statute passed without any pre-enactment evidence of need or purpose" can be valid. *Id.* at 136.

The only case we have been able to find in which an argument has been made similar to the one appellants here advance is *Contractors Association v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993). That case involved a constitutional challenge to an affirmative action ordinance favoring minorities, women, and disabled persons in the award of city construction contracts. The governing law required that the provisions of the ordinance that drew lines on the basis of race be subjected to strict scrutiny. *Id* at 1000. Thus, the city was required to show that it had a compelling state interest and that the ordinance was the least restrictive means of serving that interest. This meant that the city had the burden of producing a strong evidentiary basis for concluding that there had been preexisting

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of a legislative record is a fatal constitutional defect. *National Amusements, Inc. v. Dedham*, 43 F.3d 731 (1st Cir.), *cert. denied*, 115 S. Ct. 2247 (1995); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992); *Postscript Enter. v. Bridgeton*, 905 F.2d 223 (8th Cir. 1990); *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990); *Berg v. Health & Hosp. Corp.*, 865 F.2d 797 (7th Cir. 1989); *SDJ, Inc. v. Houston*, 837 F.2d 1268 (5th Cir. 1988); *cert. denied*, 489 U.S. 1052 (1989). Although the courts did not sustain the constitutionality of the ordinances in the other cases cited, in the course of finding those ordinances invalid, *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987), or constitutionally suspect, *Christy v. Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988), the courts focused on the failure of the municipalities to present any evidence justifying the restrictions rather than on the role of a legislative record.

discrimination against minorities in which the city had played a role and that the ordinance was necessary to remedy the continuing effects of that discrimination. *Id.* at 1001-02.

The plaintiffs in *Contractors* urged this court to hold that the ordinance was unconstitutional if the City Council did not have before it at the time of the enactment of the ordinance the required evidentiary basis. We rejected that argument. While we acknowledged that the City Council did not have the required strong evidentiary basis before it at the time it acted, we held that the ordinance could be justified on the basis of evidence acquired thereafter. *Id.* at 1003-04.

If we do not insist on a legislative record when we are required to subject a legislative measure to the highest scrutiny, we would be hard-pressed to rationalize insistence on a legislative record when we are, as here, applying a lesser, more deferential standard of constitutionality.

IV. *The Challenge to the Permit Decisions*

Appellants contend that their right to substantive due process was violated when their initial permit applications were revoked, when Rhodes, in connection with their subsequent applications, imposed requirements he had not imposed previously, and when Rhodes simply refused to act even after those requirements were met. The actions and delay were allegedly the result of a conspiracy entered into by Rhodes, the Board of Adjustment and the Mayor because of their dislike of the content of the materials appellants intended to sell. The reason given for the revocations (i.e., the erroneous lot numbers) and the new requirements, according to appellants, were simply pretexts to mask a motivation that was wholly unrelated to the merit of

their applications. The actions and delay allegedly afforded the Borough an opportunity to adopt Ordinance 31-92, which was then advanced as a reason for the denial of the last application. The district court dismissed the substantive due process count of the complaint for failure to state a claim.

In the course of evaluating these claims, the district court observed that "where there is an explicit textual constitutional provision addressing the alleged wrongs — as there is here in the form of the First Amendment — it must be the guide for liability rather than 'the more generalized notion of substantive due process.' " App. at 137. The court did not explain, however, why the allegations of the complaint concerning the period prior to the adoption of Ordinance 31-92 failed to state a claim under First Amendment standards.

The analysis of the district court, as far as it goes, is accurate. It does not follow, however, that these allegations of the complaint fail to state a substantive due process claim upon which relief could be granted.

The right to substantive due process conferred by the Fourteenth Amendment includes the right to be free from state and local government interference with certain constitutionally recognized fundamental rights. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Collins v. Harkes Heights*, 503 U.S. 115, 125 (1992); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). As we have noted in connection with the challenge to the Ordinance, among these fundamental rights are the rights expressly recognized by the First Amendment in the context of federal government interference.[7] Thus, where a state or local official

7. The constitutional basis is the same for both the challenge to the Ordinance and the challenge to the permit decisions. Both, in theory, are substantive due process claims governed by First Amendment standards (Cont'd)

Appendix A

(Cont'd)

because of the rights allegedly infringed. The district court's reference to "the more generalized notion of substantive due process" may be attributable to the fact that Phillips and Vitale rely, in addition to First Amendment jurisprudence, on a line of our cases relating to adjudicative decisions not alleged to have infringed fundamental rights. *E.g., Bello v. Walker,* 840 F.2d 1124 (3d Cir.), *cert. denied,* 488 U.S. 851, *and cert. denied,* 488 U.S. 868 (1988); *Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 667 (3d Cir. 1991), *cert. denied,* 503 U.S. 984 (1992); *Parkway Garage, Inc. v. City of Philadelphia,* 5 F.3d 685 (3d Cir. 1993); *DeBlasio v. Zoning Bd. of Adjustment of West Amwell,* 53 F.3d 592 (3d Cir.), *cert. denied,* 116 S. Ct. 352 (1995); *Blanche Road Corp. v. Bensalem Township,* 57 F.3d 253 (3d Cir.), *cert. denied,* 116 S. Ct. 303 (1995). As the defendants point out, these cases are arguably at odds with some decisions in other circuits. *See, e.g., Nestor Colon Medina & Sucesores v. Custodio,* 964 F.2d 32 (1st Cir. 1992); *Shelton v. City of College Station,* 780 F.2d 475 (5th Cir.) (en banc), *cert. denied,* 477 U.S. 905, *and cert. denied,* 479 U.S. 822 (1986). Phillips and Vitale claim that the decisions to deny or delay their permits were based on a distaste for the content of their speech. The relevant allegations of the complaint read as follows:

> 60. In particular, but without limitation, the Defendants have:
>
> (a) purported to require Phillips and Vitale to obtain a zoning permit notwithstanding that they proposed no erection, construction or structural alteration, and accordingly, no such permit is required by Ord. 25:1-20;
>
> (b) revoked the zoning permit issued to them on about March 10, 1992, purportedly because of misidentification of the property, notwithstanding that Rhodes first physically inspected the subject property; was under no misapprehension as to location or any particular with respect to the property, and would have issued the permit had the property been properly identified;
>
> (c) processed and otherwise dealt with Phillips' (Cont'd)

has prevented or punished constitutionally protected expression because of distaste for the content of that expression, there is substantive due process liability unless the defense can show that the action taken satisfies the strict scrutiny test prescribed in the First Amendment cases or that the same action would have been taken in any event for reasons unrelated to the expression. *E.g., Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle,* 429 U.S. 274 (1971) (if failure to renew a teacher was motivated by his exercise of his First Amendment rights and he would otherwise have been renewed, there is a violation of the Fourteenth Amendment); *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503 (1969) (students disciplined for wearing arm bands had their constitutional rights

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> and Vitale's second and third zoning permit applications, critically and unfavorably *because of the Defendants' distaste for adult-theme materials*;
>
> (d) purposely delayed action on Phillips' and Vitale's third zoning permit application so as to permit the Borough Council an opportunity to introduce and adopt an Adult Entertainment Use Ordinance, the requirements of which would render Phillips' and Vitale's use a prohibited use in a Highway Commercial District; and
>
> (e) applied an unconstitutional ordinance to Phillips and Vitale with a purpose to restrain their sale, rental, exchange and exhibition of adult-theme videos, as well as adult books, magazines and the like *because of their content.*

The only improper motivation alleged here is thus distaste for the content of the speech involved. Because this case involves only alleged infringements of the right to free expression, the standard of liability articulated in the above-cited cases is inapposite here.

violated if motive was disapproval of message); *Board of Ed. Island Trees Union Free Sch Dist. v. Pico*, 457 U.S. 853 (1982) (removing books from library motivated by content disapproval rather than legitimate educational concerns).

In *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992), the plaintiffs had been denied a land use permit for the construction of a "tourist residential complex" in Puerto Rico. The plaintiffs included Dr. Maximo Cerame Vivas, an outspoken member of an opposition party and a critic of the government's environmental policies. The plaintiffs alleged that the permit had been denied in retaliation for Cerame Vivas's expressions of his political views. The court reversed a summary judgment in the defendants' favor. It held that to "the extent Cerame Vivas's substantive due process claim [was] based on the alleged retaliation for his political views," it should be evaluated by First Amendment standards. *Id.* at 46. After noting the Supreme Court's holding in *Mt. Healthy*, the court concluded that the "same general principle would apply to a retaliatory refusal to grant a permit", *id.* at 41, and concluded that the plaintiffs' evidence was sufficient to permit an inference that land use planning concerns were but a pretext to mask a retaliatory motive.

We conclude that Phillips and Vitale have alleged facts that, if proven, could serve as a predicate for a recovery on their claim involving permit denial, delay and revocation. Contrary to the defendants' argument, it seems clear to us from the face of the Borough's zoning ordinance at the time of their first application that the proposed use of Lot 61 was a permitted use in a commercial zone. While the revocation of Phillips' and Vitale's permits purported to rest on the fact that the authority conferred by the permits was for Lot 59, which was in a

residential zone, the complaint alleges that everyone had a common understanding that Lot 61 was the lot in question and that, but for their dislike of the content of the proposed adult entertainment expression, Rhodes or the Board of Adjustment would have corrected the lot number on the permits and affirmed the authority which Rhodes intended to grant. Similarly, the complaint alleges that Rhodes and the Mayor interfered with the processing of the second and third applications solely because of their antipathy toward the content of the materials Phillips and Vitale intended to market.

Under these circumstances, we conclude that the district court was in error when it granted the motions to dismiss the permit claim and that the case must be remanded for further proceedings on that claim.

We offer one additional observation to assist the district court in the further proceedings on this claim. We find nothing improper in a good-faith decision by an authorized public official to delay action on all applications for authority that would be affected by a proposed amendment to the governing ordinance in order to allow a reasonable time for a legislative body to consider and vote on the proposal. Thus, if a public official authorized by local law to impose a moratorium on the issuance of permits imposed such a moratorium for the purpose of allowing the municipality a reasonable opportunity to consider whether the secondary effects of adult entertainment uses required additional zoning regulation, any resulting delay could not constitute a substantive due process violation. It is by no means clear, however, that this is what happened here. As the record develops, it may be that the trier of fact will reasonably conclude that the delay occasioned by Rhodes or the Mayor was occasioned not by concern for what the Borough

Council might determine to be undesirable secondary effects, but rather by distaste for the sexually explicit material, as Phillips and Vitale allege. The crucial difference in the two situations is the propriety of the motivation of the official causing the delay.

V. *The Claim for Litigation Expenses under 42 U.S.C. § 1988*

It follows from the foregoing discussion that Phillips and Vitale may prevail on some or all of their federal claims. To the extent they prevail on those claims, they will be entitled to an award of reasonable costs and counsel fees under 42 U.S.C. § 1988.[8]

VI. *The Equitable Estoppel Claim*

Finally, Phillips and Vitale argue that the Borough is equitably estopped under New Jersey law from revoking the

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8. Phillips and Vitale argue that they should be entitled to an award of the counsel fees they paid in connection with their efforts to enjoin the 500 foot Ordinance even if they can prove no compensable damage from that Ordinance and even if they lose on their other federal claims. Their contention is based on the following "catalyst theory": (a) the Borough adopted an unconstitutional 500 foot Ordinance and relied upon it to deny their application for a permit; (b) they challenged this Ordinance and demonstrated at an evidentiary hearing that it suppressed adult entertainment expression altogether; (c) as a result of their suit and their demonstration, the Borough Council repealed the 500 foot Ordinance; and (d) accordingly, they are "prevailing parties" under § 1988 at least to this limited extent. *See, e.g., Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541 (3d Cir. 1994); *Dunn v. United States*, 842 F.2d 1420, 1433 (3d Cir. 1988). Because the district court failed to address this "catalyst theory" and because it may ultimately be unnecessary to resolve the issues thus raised if Phillips and Vitale are otherwise successful, we express no view on those issues.

zoning permit issued by Rhodes on March 9, 1992, and the construction permits issued on March 18th. Specifically, they contend that they reasonably relied on those permits to their detriment by entering into the lease and by "beg[inning] to renovate the property in order to prepare it for their contemplated use" after receiving construction, electrical, and plumbing permits. Appellants' Brief at 38. Without the zoning permit, they allege, they would have done neither.

The district court rejected this argument in the course of denying Phillips' and Vitale's motion for summary judgment. It concluded that, under *Lizak v. Faria*, 476 A.2d 1189 (N.J. 1984), Phillips and Vitale could not demonstrate good faith reliance on the initial zoning permits and, accordingly, were not entitled to assert a claim of equitable estoppel. On appeal, Phillips and Vitale argue, *inter alia*, that *Lizak* is distinguishable and that they did rely in good faith on Rhodes' initial determination.

The doctrine of equitable estopped is well established in New Jersey.

> To establish a claim of equitable estoppel, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment.

Miller v. Miller, 478 A.2d 351, 355 (N.J. 1984); *see Carlsen v.*

Masters, Mates & Pilots Pension Plan Trust, 403 A.2d 880, 882-83 (N.J. 1979). "A prerequisite of equitable estoppel" is that such reliance be in "good faith." *Lizak*, 476 A.2d at 1198. "The doctrine of equitable estoppel is applied 'only in very compelling circumstances,' 'where the interests of justice, morality and common fairness clearly dictate that course.' " *Palatine I v. Planning Bd. of Township of Montville*, 628 A.2d 321, 328 (N.J. 1993) (citations omitted). In particular, "equitable estoppel is rarely invoked against public entities, although it may be invoked to prevent manifest injustice." *W.V. Pangborne & Co., Inc. v. New Jersey Dep't of Transportation*, 562 A.2d 222, 227 (N.J. 1989); *see O' Malley v. Dep't of Energy*, 537 A.2d 647, 650-51 (N.J. 1987).

In *Lizak*, the Farias had applied for a zoning variance. 476 A.2d at 1191-93. After opposition from nearby residents, the Woodbridge Township Board of Adjustment denied the variance. *Id.* at 1191. However, the board failed to record its determination in writing. As a result the Farias, under New Jersey law, were entitled to an automatic grant of the variance. *Id.* at 1192. A day after the Woodbridge Municipal Clerk certified the grant of the variance, the Farias obtained a building permit, and ten days later they began construction. Within a month, the exterior of the building was completed at an estimated expense of $60,000, almost one-half of the estimated cost of the project. When a nearby resident realized what was happening, she filed an appeal to the Township Council seeking revocation of the variance and the permit and an order directing the removal of the construction. The Farias responded that they had relied on the issuance of a valid building permit in proceeding with the construction and that the municipality was equitably estopped from ordering the removal of the existing structure. *Id.* at 1193.

Appendix A

The New Jersey Supreme Court rejected the Farias' argument. *Id.* at 1198-99. After noting that good faith reliance is a prerequisite of equitable estoppel, the court explained:

> The Farias' conduct . . . does not so much bespeak good faith reliance as it reveals a "hasty effort to attempt to acquire an unassailable position to which [they] equitably should not be entitled." They knew that their neighbors objected to the proposal and that the Board had orally disapproved their application. Consequently, they reasonably could have expected further opposition to the construction. They chose to rely on the advice of counsel that the Board's failure to reduce its decision to writing converted its oral denial into a statutory grant. Although that advice was correct as far as it went, the Farias' failure to publish a notice of approval left the variance subject to appeal for a reasonable time. In relying on their attorney's opinion while the underlying variance was still appealable, they took their chances. They should not now be heard to complain.

Id. at 1198 (citation omitted).

Phillips and Vitale, in this appeal, urge that there is a world of difference between their circumstances and those of the Farias. However, we reject appellants' effort to limit *Lizak* to its admittedly egregious facts. The driving force in that case was that parties who proceed with construction while their permits

are still appealable "[take] their chances." *Id.* As the trial court in *Lizak* explained,

> their reliance can not convert the permit into something not subject to administrative and judicial review. They could not reasonably have relied upon the inviolability of municipal actions that were still subject to appeal. The . . . construction official's action assured [the Farias] that a permit was issuable, but not that [it] was not appealable.

Lizak v. Faria, 434 A.2d 659, 664 (N.J. Super. 1981).

To sustain appellants' position here would eviscerate the appellate process in land use applications. It would encourage recipients of zoning permits to launch into large-scale construction or renovation so as to present municipal authorities with a *fait accompli* before other affected parties have exhausted their opportunities to challenge the permit. We believe these considerations support the clear mandate of the highest court in New Jersey in *Lizak.*

VII. *Conclusion*

The judgment of the district court will be reversed and the case will be remanded for further proceedings consistent with this opinion.

Appendix A

ALITO, Circuit Judge, concurring and dissenting.

I join all but part IV of the opinion of the court. As I read the plaintiffs' complaint, it asserts a substantive due process claim under a line of panel decisions that stems from *Bello v. Walker,* 840 F.2d 1124 (3d Cir.), *cert. denied,* 488 U.S. 851 and 868 (1988). *See also Blanche Road Corp. v. Bensalem Township,* 57 F.3d 253, 268 (3d Cir.), *cert. denied,* 116 S.Ct. 303 (1995); *DeBlasio v. Zoning Board of Adjustment,* 53 F.3d 592, 599-601 (3d Cir.), *cert. denied,* 116 S.Ct. 352 (1995); *Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 667, 683 (3d Cir. 1991), *cert. denied,* 503 U.S. 984 (1992). *Bello* and the subsequent panel decisions — which followed *Bello,* as was of course required — seem to hold that substantive due process is violated whenever a government official who harbors "some improper motive," *Midnight Sessions, Ltd.,* 945 F.2d at 683, deprives a person of certain property rights, apparently including the unrestricted use of the person's real estate. *See DeBlasio,* 53 F.3d at 600-01.

Under these decisions, the plaintiffs could prevail on remand by showing simply that the defendants deprived them of a protected property interest for some "improper motive"; a motive that is violative of the First Amendment would not have to be shown. As the plaintiffs stated in their brief, under *Bello,* "[i]n the land use context, . . . [w]here there is a deliberate and arbitrary abuse of government power, an individual's right to substantive due process may be violated."

Rather than applying (and thus reaffirming) *Bello* and its progeny, the majority has transformed the plaintiffs' *Bello* claim into what is in essence a First Amendment claim,[1] and the

1. To be sure, as the majority notes, the substantive component of the Fourteenth Amendment's Due Process Clause incorporates specific (Cont'd)

majority thus requires them to show on remand that the defendants harbored an intent that was violative of the First Amendment. This narrowing interpretation of the complaint is not proper in an appeal from an order of dismissal under Fed. R. Civ. P. 12 (b)(6), but this approach permits the majority to evade the question whether *Bello* was correct.

Since the plaintiffs have asserted a *Bello* claim, I think that the in banc court should confront the question whether *Bello* remains good law. If it does, the full court should not be hesitant to reaffirm it. But if — as the court's approach here signals — the in banc majority is uncertain about *Bello's* validity, the court should not skirt the issue. The question is properly before us; *Bello* and its progeny are important decisions that are invoked with some frequency; and a resolution of the validity of these precedents as components of circuit law would be useful to the district courts and the bar. The majority's approach, which leaves these decisions in limbo, may lead to much wasted litigation before the district courts and before panels of this court, which are of course bound by *Bello* until it is overruled by the in banc court or by the Supreme Court.

As I have previously suggested, see *Homar v. Gilbert*, 89 F.3d 1009, 1029-30 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part), *cert. granted on other issue*, 117 S.Ct. 678 (1997), I think that *Bello* was wrong and was based

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(Cont'd)
guarantees set out in the Bill of Rights, including the right to freedom of speech and of the press protected by the First Amendment, and therefore in this sense every free speech claim challenging a state action is a substantive due process claim. But this aspect of the substantive component of due process is very different from the aspect of substantive due process on which *Bello* was based.

on a misreading of Supreme Court precedent. In *Bello*, the plaintiffs claimed that certain municipal officials had "improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits." 840 F.2d at 1129. The panel held that "[t]hese actions . . . if proven, are sufficient to establish a substantive due process violation. . . ." *Id.* at 1129-30. The panel wrote:

> The Supreme Court has discussed the scope of the substantive due process right in a number of recent cases. In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L. Ed. 2d 662 (1986), the Court, in holding that the due process clause was not implicated by a state's negligent deprivation of life, liberty or property, pointed out that the guarantee of due process has historically been applied to deliberate decisions of government officials. *Id.* at 331, 106 S.Ct. at 665. The Court noted that the clause was " ' "intended to secure the individual from the arbitrary exercise of the powers of government," ' " *id.* (quoting *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 116, 28 L. Ed. 232 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244, 4 L. Ed. 559 (1819))), and distinguished the *Daniels* case from cases involving an abuse of power.
>
> In the related case of *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L. Ed. 2d

> 677 (1986), the Court held that mere negligence on the part of a state does not amount to an abuse of state power such that constitutional due process is implicated. Justice Blackmun, dissenting, noted that he agreed with the majority's conclusion that a "deprivation must contain some element of abuse of governmental power, for the 'touchstone of due process is protection of the individual against arbitrary action of the government.' " *Id.* at 353, 106 S.Ct. at 673 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 95 S.Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974). *See also Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L. Ed. 2d 450 (1977) (constitutional due process right to be free of arbitrary or irrational zoning action); *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied*, [482 U.S. 906], 107 S.Ct. 2482, 96 L. Ed. 2d 375 (1987) (to demonstrate violation of right to substantive due process, plaintiff must show that land use regulation was arbitrary or irrational). These cases reveal that the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process.

840 F.2d at 1128-29.

In my view, this analysis is clearly flawed. In the first place, neither *Daniels v. Williams, supra*, nor *Davidson v. Cannon,*

supra, provides much guidance on substantive due process since neither was a substantive due process case. Instead, both concerned procedural due process. In *Daniels*, the plaintiff was an inmate who alleged that he had slipped and fallen on a pillow that had been left on the stairs by a correctional deputy. The Supreme Court summarized his constitutional claim as follows:

> [The deputy's] negligence, the argument runs, "deprived" [the plaintiff] of his "liberty" interest in freedom from bodily injury . . . ; because [the deputy] maintains that he is entitled to the defense of sovereign immunity in a state tort suit, [the plaintiff] is without an "adequate" state remedy. . . . Accordingly, the deprivation of liberty was without "due process of law."

474 U.S. at 328.

This was plainly a procedural, not a substantive, due process claim. Substantive due process bars certain government actions irrespective of the fairness of the procedures used to implement them, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), and the plaintiff in *Daniels* was not arguing that his due process rights would have been violated even if fair procedures had been available (i.e., even if he had been able to obtain a complete recovery for his damages) under state law. Rather, he was contending that the deprivation of his liberty interest was "without due process of law" because the state did not provide adequate post-deprivation procedures.

Similarly, the plaintiff in *Davidson* asserted a procedural, not a substantive, due process claim. In that case, the plaintiff

was an inmate who claimed that prison officials had negligently failed to protect him from a fellow inmate who attacked him. The Court wrote:

> [The plaintiff] emphasizes that he "does not ask this Court to read the Constitution as an absolute guarantor of his liberty from assault from a fellow prisoner, even if that assault is caused by the negligence of his jailers." Brief for Petitioner 17. Describing his claim as "*one of procedural due process, pure and simple*," *id.*, at 14, all he asks is that [the state] provide him a remedy.

474 U.S. at 348 (emphasis added).

Justice Stevens' concurrence also emphasized that the claims in both *Daniels* and *Davidson* concerned procedural, not substantive, due process. He wrote:

> I do not believe petitioners have raised a colorable violation of "substantive due process."[16] Rather, . . . Daniels and Davidson attack the validity of the procedures that Virginia and New Jersey, respectively, provide for prisoners who seek redress for physical injury caused by the negligence of corrections officers.

16. Davidson explicitly disavows a substantive due process claim. See Brief for Petitioner in No. 84-6470, p.7 ("[P]etitioner frames his claim here purely in terms of procedural due process). At oral argument, counsel for Daniels did suggest that he was pursuing a

> substantive due process claim. Tr. of Oral Arg. in No. 84-5872, p. 22. However, the Court of Appeals viewed Daniels' claim as a procedural due process argument, see 748 F.2d 229, 230, n.1 (CA4 1984) ("There is no claim of any substantive due process violation"), and Daniels did not dispute this characterization in his petition for certiorari or in his brief on the merits. . . .

474 U.S. at 340 & n.16. Thus, it seems clear that neither *Daniels* nor *Davidson* was a substantive due process case. Moreover, neither *Daniels* nor *Davidson* provided any extended or novel discussion of substantive due process. *Daniels* devoted one sentence to the topic, *see* 474 U.S. at 331-32, and *Davidson* did not mention it at all.

Despite the fact that *Daniels* and *Davidson* were not substantive due process cases and had little to say about substantive due process, *Bello* used them as the basis for an important substantive due process holding. From them, *Bello* extracted the unremarkable proposition that the constitutional guarantee of due process was intended to protect the individual against the arbitrary exercise of government power, and *Bello* then reasoned that "the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." 840 F.2d at 1129. This reasoning overlooked the fact that the primary means by which due process protects against the arbitrary exercise of power by government officials is by requiring fair procedures, i.e., by requiring adherence to principles of *procedural* due process. Only in extreme circumstances is it proper to invoke substantive due process.

In addition to *Daniels* and *Davidson*, *Bello* cited, in support of its substantive due process analysis, one other Supreme Court

case, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977), and one Third Circuit case, *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied*, 482 U.S. 906, *reh'g denied*, 483 U.S. 1040 (1987). However, *Bello* seems to have misinterpreted these decisions in an important respect. *Arlington Heights* and *Pace Resources* stand for the principle that a zoning ordinance violates substantive due process if the zoning authority could not have had a rational basis for adopting it. As *Pace* explained, " 'federal judicial interference with a state zoning board's quasi-legislative decisions, like invalidation of legislation for "irrationality" or "arbitrariness," is proper *only if the governmental body could have had no legitimate reason for its decision.*' " 808 F.2d at 1034 (citation omitted) (emphasis added in *Pace*). *Pace* did not suggest that a plaintiff could state a valid substantive due process claim merely by alleging that an ill-motivated government official had interfered with the plaintiff's use of his or her real estate. On the contrary, *Pace* held that the challenged government actions in that case did not violate substantive due process even though a state court had found them to be " 'arbitrary and unjustifiably discriminatory.' " *Id.* at 1028, 1034 (citation omitted). Furthermore, *Pace* quoted with approval a First Circuit case, *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982), which stated that a "conventional planning dispute," "*regardless of . . . defendants' alleged mental states*," does not implicate substantive due process, "at least when not tainted with fundamental procedural irregularity, racial animus, or the like." *Id.* at 833 (emphasis added).

Bello, however, took the highly deferential, objective test set out in *Arlington Heights* and *Pace* — whether the zoning authority *could* have had a rational basis for its action — and

turned it into a subjective test of good faith, i.e., whether municipal officials' actions in connection with land use matters were taken for "partisan political or personal reasons unrelated to the merits of the application for the permits." 840 F.2d at 1129. This was a significant step, *see* 2 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law* § 15.4 at 415 n.60 (1992 & 1996 Supp.), and the *Bello* court did not provide any explanation for it.

The Supreme Court has stated: "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins*, 503 U.S. at 125. However, *Bello* broke new ground, without acknowledging that it was doing so, and I see nothing in *Bello* or the cases that have followed it that convinces me that every ill-motivated governmental action that restricts the use of real estate constitutes a violation of substantive due process. Most of the serious abuses that occur in this area, such as instances of invidious discrimination, can be redressed by other means, in either federal or state court or both. Under *Bello* and its progeny, however, mundane land-use disputes that belong in state court are transformed into substantive due process claims cognizable under 42 U.S.C. § 1983. In addition, these precedents may well be extended to other fields, such as public employment, *see e.g.*, *Homar v. Gilbert*, 89 F.3d at 1021; *id.* at 1026-28 (Alito, J., concurring in part and dissenting in part). I would curtail this trend and would overrule *Bello* and the cases that followed it. *See Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir. 1992) (holding that allegations that city arbitrarily applied zoning ordinance

were insufficient to state a substantive due process claim, and stating in dicta that "[o]ur decision would be the same even if the City had knowingly enforced the invalid zoning ordinance in bad faith. . . . A bad-faith violation of state law remains only a violation of state law."); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 32 (1st Cir. 1991) ("Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the Vacia Talega project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label."), *cert. dismissed*, 503 U.S. 257, *reh'g denied*, 504 U.S. 935 (1992); *Rivkin v. Dover Tp. Rent Leveling Bd.*, 143 N.J. 352, 371, 671 A.2d 567, 577 (holding that substantive due process was not violated when rent leveling board member acted in biased manner, and disagreeing with *Bello* because "we seriously doubt that the Supreme Court will find a substantive due process violation to exist when a governmental body denies a property right by conduct that is 'arbitrary or irrational' under state law but neither shocking to the conscience of a court in the sense of being a departure from civilized norms of governance, nor offensive to human dignity") (citation omitted), *cert. denied*, 117 S.Ct. 275 (1996).

Thus, while I would remand the plaintiffs' First Amendment claim, both with respect to the defendants' pre- and post-ordinance conduct, I would affirm the dismissal of the plaintiffs' substantive due process claim.

Appendix A

ROSENN, *Circuit Judge, dissenting.*

Although I agree with the majority's analysis of the facts and much of the law, I differ with them with respect to Part III (C), "The Necessity of Pre-Enactment Evidence." The majority concludes that a municipality may constitutionally enact an ordinance restricting the expression of speech without any legislative record before it justifying such restrictions. I believe that the Borough of Keyport's failure to articulate at the time of enactment any governmental interest justifying its ordinance No. 31-92, designed to curb protected speech expression, is a fatal constitutional defect. The defect cannot be cured by allowing the municipality to structure a post hoc record more than four years later and then after judicial review by a trial and appellate court.

I.

The majority and I agree that speech, whether in the form of film, print, or live presentations, though sexually explict in content but not obscene, is protected under the First Amendment. *Maj. op.* at 11. We further agree that when a legislative body acts to regulate speech on the basis that its action serves a substantial, content-neutral state interest as Keyport Borough did in this case, it must come forward with evidence of adverse social effects that justify reasonable time, place, and manner restrictions on speech or expressive conduct; the municipality must support its position "with a reasonedand substantial basis demonstrating the link between the regulation and the asserted governmental interest." *Maj. op.* at 13, quoting *Mitchell v. Commission on Adult Entertainment*, 107 F.3d 23, 132 (3d Cir. 1993). It is undisputed that Keyport Borough failed this indispensable requirement. It is also undisputed that the

district court sustained the constitutionality of the Keyport ordinance which substantially burdened the exercise of protected speech "without a record supporting the reasonableness of any legislative expectations" that warranted its findings pertaining to the likelihood of secondary effects and the ameliorative effect of the ordinance.

> [W]e do not yet know how the Borough will seek to justify the ordinance. There is no articulation by the state of what it perceives its relevant interests to be and how it thinks they will be served. This is particularly troublesome in a case like this, where the legislative findings speak in terms of "serious objectionable operational characteristics," "deleterious effects," and "the deterioration of the community" without identifying in any way those [considerations].

Maj. op. at 14.

Where we part company, however, is that the majority, in the face of a decision of the Supreme Court and decisions of a substantial number of United States courts of appeals to the contrary, holds today that a legislative body need have no record before it at the time of enactment justifying an ordinance regulating protected speech. Although I fully empathize with the efforts of the Borough of Keyport to preserve a wholesome quality of community life, I cannot lend my support to the majority's potentially dangerous disregard of an established safeguard in protection of cherished First Amendment rights, namely, a record at the time of enactment justifying the restrictive regulation of protected speech.

Appendix A

There is no question that local legislative bodies are to be afforded great deference when it comes to zoning matters. *Rogin v. Bensalem Township*, 616 F.2d 680, 698 (3d Cir. 1980). The Supreme Court, however, has made clear that the latitude generally afforded legislatures may be narrowed when First Amendment concerns are at stake. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1977). Although sexually oriented materials are due less protection than other forms of expression, *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1975), their regulation by zoning nonetheless triggers a heightened level of scrutiny. Courts have reconciled respect for local land regulation concerns with the protection of speech by requiring that municipalities impose restraints on adult entertainment establishments only where there is evidence that they have deleterious "secondary effects" upon the adjacent areas. *Id.* at 71 n.4.

Although adult entertainment establishments may provide a form of entertainment that is not without any First Amendment protection from municipal authority, *see Schad v. Mt. Ephraim*, 452 U.S. 61, 65 (1980); *American Mini Theatres*, 427 U.S. at 59, the majority's position that the evidence may be developed at any time after the zoning enactment until challenged in court runs counter to the purpose of such an evidentiary requirement, the view taken by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and by virtually every other circuit in this country.

We are not free to ignore the purpose of the requirement and the binding precedent. Thus, I find the majority view on this issue unacceptable. The majority makes several sweeping statements to the effect that this court has "never" required more of a municipality than it make the required showing once a

challenge to legislation is raised. It ignores the significance of the timing for the evidentiary record to justify the restrictive impositions of speech; if speech is to be so restricted, the justification should be stated at the time of enactment so that appropriate judicial scrutiny might be made. The majority offers no support whatsoever for its statements, and I do not believe such support exists in our precedents with respect to the regulation of protected speech.

Renton stands only for the proposition that a municipality need not conduct its own pre-enactment studies (i.e., that it may rely on studies conducted by other communities). The unavoidable inference from *Renton* is that the municipality must rely upon something at *the time of enactment* justifying its action limiting freedom of speech. The various courts of appeals, including our own in *Mitchell, supra,* have emphasized the Supreme Court's statement that

> [t]he First Amendment does not require a city, *before enacting* such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*

Renton, 475 U.S. at 51-52 (emphasis added). Accordingly, not a single court of appeals has interpreted *Renton* as requiring absolutely no pre-enactment evidence.[1] The position adopted

1. The Supreme Court itself, in a case decided four years after *Renton*, seems to assume that at least some pre-enactment evidence *is* required in this type of case. "We agree with the Court of Appeals that the reasonableness of the legislative judgment, *combined with the Los Angeles study*, is adequate to support the city's determination. . . ." *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 236 (1990) (emphasis added).

by the majority leaves the the Circuit an outlier among the United States courts of appeals.

The majority asserts that because *Renton* and *Mitchell* sustained the constitutionality of the ordinances before them, they cannot stand for the proposition that a legislative record is a constitutional prerequisite to validity. I strongly disagree. Both the *Renton* Court and the *Mitchell* court leave no doubt that pre-enactment evidence is indeed a constitutional requirement; the courts sustained the ordinance in question because they were satisfied that the enacting body had sufficient evidence before it. *See Renton*, 475 U.S. at 51-52; *Mitchell*, 10 F.3d at 134-35.

The majority also maintains that in *Mitchell*, this court expressly reserved the issue of whether pre-enactment evidence is necessary. Again, I disagree. *Mitchell* plainly requires such evidence. The skillful use of ellipses ought not to allow us to circumvent binding precedent. The majority asserts that *Mitchell* says that it was "unnecessary . . . to reach or decide . . . whether a statute passed without any pre-enactment evidence of need or purpose" can be valid. The full quotation, sans ellipsis, makes quite a different point. It reads: "Here, it is unnecessary for us to reach or decide whether the *doctrine of legislative notice* of the incidental activities common to adult book stores can *save* a statute passed without any evidence of pre-enactment evidence of need and purpose." *Mitchell*, 10 F.3d at 136 (emphasis added).

We are thus bound by both Supreme Court precedent and the precedent of our own circuit to require at least some evidence at the time of adoption before we sustain a restrictive ordinance of the type currently before us. The majority is of the view that the legislative body need have no factual basis before it at the time of the enactment of the ordinance, and that such a

requirement is only necessary when the legislative judgment is challenged in court. *Maj. op.* at 22-23. If we look to cases decided in our sister circuits, we also see that no other circuit in this country has espoused the extreme, and I believe incorrect, position taken by the majority. Cases similar to the one at bar have been decided in the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.[2] Every one of these circuits has interpreted *Renton* to require pre-enactment evidence, and

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2. *National Amusements, Inc. v. Dedham*, 43 F.3d 731, 742 (1st Cir.) (stating that a legislative body may rely on whatever pre-enactment evidence it considers to be relevant), *cert. denied*, 115 S. Ct. 2247 (1995); *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415, 1421-23 (4th Cir. 1989) (finding pre-enactment evidence of secondary effect "sufficient under *Renton* to withstand a constitutional challenge"), *vacated on other grounds*, 496 U.S. 901 (1990); *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988) ("We are persuaded that the City met its burden under *City of Renton* to establish that there was evidence before it from which the Council was entitled to reach its conclusion. . . ."), *cert. denied*, 489 U.S. 1052 (1989); *Christy v. Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987) ("Although both the Supreme Court in *Renton* and the Sixth Circuit . . . have stated that a city need not conduct new independent studies to justify adult business zoning ordinances, both courts have required some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses"), *cert. denied*, 484 U.S. 1059 (1988); *Berg v. Health & Hosp. Corp.*, 865 F.2d 797, 803-04 (7th Cir. 1989) (detailing the pre-enactment evidence and testimony upon which governmental body relied); *Postscript Enter. v. Bridgeton*, 905 F.2d 223, 227 (8th Cir. 1990) (upholding an ordinance after determining that the city council's pre-enactment findings were adequate); *Tollis Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) ("The County must show that in enacting the particular limitations . . . it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects"); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1163 (11th Cir. 1991) (noting that Broward County had relied on the experiences of Detroit in enacting its ordinance), *cert. denied*, 503 U.S. 920 (1992).

every one of these circuits has insisted upon such evidence before affirming the constitutionality of a restrictive zoning ordinance.

The majority argues that most of the cases I cite from other circuits sustained the ordinance and "therefore cannot stand for the principle that the lack of a legislative record is a fatal constitutional defect." *Maj. op.* at 23-24, n.6. Those ordinances that were sustained, however, did have legislative records at the time of their enactment. Those held constitutionally defective, *Tollis, Inc. v. San Bernardino County*, 827 F.2d. 1329 (9th Cir. 1987), or constitutionally suspect, *Christy v. Ann Arbor*, 824 F.2d. 489 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988), did not have legislative records.

The majority also looks for support to the decision by this court in *Contractors Ass'n v. City of Phila.*, 6 F.3d 990 (3d Cir. 1993). Aside from the fact that *Contractors* is inapposite in that it was an affirmative action case, principally sought injunctive relief, and did not involve free speech, it does not stand for the proposition that pre-enactment evidence is unnecessary. We simply stated in *Contractors* that the pre-enactment evidence considered by the Philadelphia City Council could be *supplemented* by post-enactment evidence at the time the case went to trial. *Id.* at 1003-04. Moreover, we were uncertain whether the supplemental evidence did not in fact constitute pre-enactment evidence because it was a study involving minimal risk of "insincerity associated with post-enactment evidence" for it consisted "essentially of an evaluation and re-ordering of pre-enactment evidence. . . ." Finally, the court was strongly influenced in permitting the admission of the post-enactment study because "the principal relief sought, and the only relief granted by the district court, was an injunction." *Id.* at 1004.

At this juncture, the effects of adult entertainment establishments are so open and notorious that requiring legislative bodies to consult studies or other evidence confirming their deleterious impact may seem unnecessarily burdensome — just another hoop to jump through in the process of lawmaking. However, this requirement is not without purpose. It limits the risk that legislatures will impose restrictions on speech activities on the basis of supposed secondary effects that on closer scrutiny lack any evidentiary support, and it lends support to the representation that the content-neutral interest articulated by the lawmaking body was not merely pretextual and illicitly designed to suppress speech expression, even that constitutionally protected.[3] I am as sympathetic as the majority to Keyport's well-intentioned purpose of preserving its community life, but the First Amendment cases show that "in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height." *Young v. American Mini Theatres*, 427 U.S. at 87 (Stewart, J., dissenting). Because the Borough of Keyport had no evidence of deleterious secondary effects before it when it enacted its restrictive zoning ordinance, our jurisprudence requires that we strike down the ordinance as unconstitutional.

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3. The majority suggests that this modest procedural hurdle will be of little practical effect against a "municipal body bent on regulating or curbing speech." *Maj. op.* at 23. I agree that a legislature determined to restrict forms of speech to which it is hostile may be able to conceal its impermissible motive behind a quickly assembled evidentiary fig leaf. At the same time, I would reasonably expect that the pre-enactment justification requirement might act as a shield for the First Amendment not merely from those with ill intent, who may be able to circumvent any procedural requirements imposed, but also from constitutionally-minded legislators driven by haste or misconception.

Appendix A

II.

Accordingly, I believe that we must reverse the district court's grant of the defendants' motion to dismiss on the due process claims and reverse the district court's denial of plaintiffs' motion for summary judgment on the First Amendment challenge to the "adult entertainment uses" ordinance No. 31-92. For the reasons stated above, I would hold that the ordinance does violate the First Amendment, strike it down, and remand the case to the district court to consider plaintiffs' request for damages. Finally, I would vacate the denial of attorney's fees and also remand this issue to the district court for further proceedings.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5143

GEORGE PHILLIPS; PHILIP VITALE,

Appellants

v.

BOROUGH OF KEYPORT; VICTOR RHODES; BOARD OF ADJUSTMENT

On Appeal From the United States District Court
For the District of New Jersey

(D.C. Civil Action No. 93-cv-00415)

BEFORE: STAPLETON, SAROKIN,* AND ROSENN, *Circuit Judges*

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and ROSENN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and

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* Hon. H. Lee Sarokin heard argument before the original panel but retired from office prior to the *en banc* hearing.

was argued by counsel on December 8, 1995 and reargued en banc on September 19, 1996.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court entered February 17, 1995, be, and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:
s\ illegible
Chief Deputy Clerk

Dated: February 21, 1997

Costs taxed in favor of Appellants as follows:

Brief	$211.70
Appendix	$301.00
Reply Brief	$92.80
TOTAL	$605.50

Certified as a true copy and issued in lieu
of a formal mandate on June 11, 1997.

Teste: s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED FEBRUARY 14, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 93-415 (GEB)

GEORGE PHILLIPS, *et al.*,

Plaintiffs,

v.

BOROUGH OF KEYPORT, *et al.*,

Defendants.

MEMORANDUM OPINION

BROWN, District Judge

This matter comes before the Court on plaintiffs' motion for partial summary judgment on the issue of equitable estoppel and plaintiffs' counsel's request for pendente lite costs pursuant to 42 U.S.C. § 1988. For the following reasons, the Court will deny plaintiffs' motion. Moreover, this Court will deny plaintiffs' counsel's request for pendente light costs because plaintiffs are not the prevailing party as mandated by 42 U.S.C. § 1988. Additionally, because there remain no issues of material fact and because all legal issues have been resolved in favor of defendants, the Court will dismiss the above-captioned action as moot.

Appendix B

I. BACKGROUND

The Court adequately outlined the factual background of this case in its Memorandum and Order dated July 15, 1993. Therefore, this Court will only discuss those facts relevant to plaintiffs' equitable estoppel claim. On February 25, 1992, plaintiffs George Phillips and Philip Vitale submitted an application for a zoning permit to operate a retail book store with novelties, amusements and videos at 65 Highway 36, Block 103, Lot 59 in the Borough of Keyport. Plaintiffs submitted the application to defendant Victor Rhodes, the Borough of Keyport zoning officer. Subsequently, defendant Rhodes contacted plaintiffs, requesting that they clarify the nature of the intended use at the above-mentioned property. Thereafter, plaintiff Vitale more specifically described the intended use to include video sales and rentals and an adult video arcade in which no one under 21 years of age would be permitted. On March 10, 1992, based on the advice of counsel, defendant Rhodes issued plaintiffs the requested zoning permit.

Thereafter, plaintiffs entered into a lease agreement for the property known as 65 Highway 36 for a term of five years. On March 18, 1992, plaintiffs made applications for construction, electrical and plumbing permits, which were ultimately approved and issued by defendant Rhodes. Upon receipt of the building permits, plaintiffs commenced to repair and renovate the leased premises.

On March 29, 1992, Charles J. Barreca of 60 Monroe Street, Keyport, filed an appeal with the Secretary of the Board of Adjustment, challenging defendant Rhodes's issuance of the zoning, construction, electrical and plumbing permits. Specifically, Barreca asserted that the various permits were issued

with respect to the property known as Block 103, Lot 59, but the property in question was actually Block 103, Lot 61. On April 2, 1992, defendant Rhodes issued and posted on the property a Stop Construction Notice which advised plaintiffs that an appeal had been filed and ordered that all construction cease until a decision was rendered. Ultimately, on April 20, 1992, the Board of Adjustment reversed defendant Rhodes's initial issuance of the zoning permit. Subsequently, plaintiffs filed a number of unsuccessful zoning applications for the property in question.

II. DISCUSSION

A. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Appendix B

B. PLAINTIFFS' EQUITABLE ESTOPPEL CLAIM

Plaintiffs contend that because they detrimentally relied on the March 10, 1992 zoning permit and the March 18, 1992 construction permits, the Borough of Keyport should be equitably estopped from denying plaintiffs the requisite zoning permit. As the New Jersey Supreme Court stated in *Lizak v. Faria*, 96 N.J. 482 (1984), "[a] prerequisite of equitable estoppel, however, is the good faith reliance by one party on conduct of another to the detriment of the relying party." *Id.* at 499. *N.J.S.A.* 40:55D-72(a) provides that:

> Appeals to the board of adjustment may be taken by any interested party affected by a decision of an administrative official of the municipality based on or made in the enforcement of the zoning ordinance or official map. Such appeal shall be taken within 20 days by filing a notice of appeal with the officer from whom the appeal is taken specifying the grounds of the appeal.

Id. Here, plaintiffs acted on the permits within the applicable 20 day statutory appeal time as set forth in *N.J.S.A.* 40:55D-72(a). "In relying on [these permits] while the underlying variance was still appealable, they took their chances." *Lizak*, 96 N.J. at 500. Plaintiffs conduct "does not so much bespeak good faith reliance as it reveals a 'hasty effort . . .' " to open a controversial adult theme bookstore and arcade in the Borough of Keyport. *Id.* at 499 (*quoting Donadio v. Cunningham*, 58 N.J. 309, 321 (1971)). Because plaintiffs cannot demonstrate good faith reliance on the initial zoning permits, they are not entitled to assert a claim of equitable estoppel. Accordingly,

this Court will deny plaintiffs' motion for partial summary judgment as to their equitable estoppel claim.

C. PLAINTIFFS' COUNSEL'S REQUEST FOR PENDENTE LITE COSTS

Also before the Court is plaintiffs' counsel's request for pendente lite costs as a prevailing party pursuant to 42 U.S.C. § 1988. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of [42 U.S.C. § 1983] . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fees as part of the costs." *Id.* In *Dunn v. United States,* 842 F.2d 1420 (3d Cir. 1988). The Third Circuit stated that:

> The test for prevailing party status is essentially a twofold inquiry. Although framed in various ways, the first part of the test "is whether plaintiff achieved some of the benefit sought by the party bringing the suit." The second part of the prevailing party test is that of causation, *i.e.*, whether the "litigation 'constituted a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief.' " The district court must determine whether the plaintiff's lawsuit is casually linked to the relief obtained, *i.e.*, whether it changed the defendant's conduct or the action to be undertaken.

Id. at 1433 (internal citations omitted). In the present case, plaintiffs are not a prevailing party in that they did not achieve

any benefit or obtain any relief as a result of their § 1983 lawsuit. *Id.* Because plaintiffs are not a prevailing party, this Court will deny plaintiff's counsel's request for pendente lite costs pursuant to 42 U.S.C. §1988. An appropriate order is filed herewith.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 93-415 (GEB)

GEORGE PHILLIPS, *et al.*,

Plaintiffs,

v.

BOROUGH OF KEYPORT, *et al.*,

Defendants.

ORDER

For the reasons set forth in this Court's Memorandum Opinion,

It is on this 14th day of February, 1994,

ORDERED that plaintiffs George Phillips and Philip Vitale's motion for partial summary judgment on their equitable estoppel claim be and is hereby DENIED; and it is

FURTHER ORDERED that plaintiffs' counsel's request for pendente lite costs pursuant to 42 U.S.C. §1988 be and is hereby DENIED; and it is

FURTHER ORDERED that since there remain no issues of material fact and this Court having resolved all legal issues in defendants' favor, that the above-captioned action be and is hereby DISMISSED in its ENTIRETY as MOOT.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED FEBRUARY 3, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 93-415 (GEB)

GEORGE PHILLIPS, *et al.*,

Plaintiffs,

v.

BOROUGH OF KEYPORT, *et al.*,

Defendants.

MEMORANDUM AND ORDER

BROWN, District Judge

This matter comes before the Court on plaintiffs' motion for partial summary judgment and for preliminary injunctive relief. For the following reasons, the Court will deny plaintiffs' motion for partial summary judgment and plaintiffs' application for preliminary injunctive relief.

I. BACKGROUND

The Court adequately outlined the factual background of this case in its Memorandum and Order dated July 15, 1993.

Appendix C

II. DISCUSSION

A. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. REASONABLE ALTERNATIVES FOR FREE SPEECH

The only issue unresolved following this Court's July 15, 1993 Memorandum and Order is whether the Borough of Keyport's (hereinafter "Keyport") zoning ordinance 31-92 offers reasonable alternatives for free speech. There are no factual disputes concerning Ordinance 31-92, rather, the parties dispute whether the ordinance as applied is constitutional. Thus, plaintiffs move for partial summary judgment and preliminary injunctive relief seeking to have this Court declare that the ordinance in question offers no viable alternatives for free

speech. To make this legal determination, this Court must consider plaintiffs' expert report (the Vansant Affidavit), defendants' expert report (the Maser Letter), and the submitted photographic and zoning map exhibits. After reviewing the above-mentioned documents, this Court concludes that Keyport's zoning ordinance 31-92, which restricts "adult entertainment uses," provides adequate alternatives for free speech.

The Supreme Court decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), provides this Court with guidance. In *Renton*, the Supreme Court held that a local zoning ordinance which restricted "adult entertainment uses" was not unconstitutional because it provided alternative avenues for free expression. *Id.* at 53-54. The Court stated:

> turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways, and roads."
>
> Respondents argue, however, that some of the land in question is already occupied

> by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. The Court of Appeals accepted these arguments, concluded that the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech.
>
> We disagree with both the reasoning and the conclusion of the Court of Appeals. *That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.*

Id. (emphasis added). Thus, pursuant to the *Renton* decision, this Court must determine whether Keyport's zoning ordinance 31-92 offers reasonable alternatives for free speech. To make this legal determination, this Court must consider: (1) the Vansant Affidavit; (2) the Maser Letter; and (3) plaintiff's and defendant's photographic and zoning map exhibits presented at the September 15 and 17, 1993 evidentiary hearing.

1. AFFIDAVIT OF GEORGE A. VANSANT

Relying on the Affidavit of George A. Vansant, plaintiffs contend that Keyport's zoning ordinance 31-92 offers no viable alternative avenues for free speech. After reviewing the ordinance and the actual physical land, George Vansant concluded that:

Appendix C

32. Applying the 500 foot restriction from any residence, residential use or residential zone in Keyport . . . to Keyport's industrial district results in a constriction of the land area in that district available for location of an adult entertainment use to 5.3 acres or 58/100ths of 1% of the total land area in the borough.

33. Not all of that 5.3 acres is developable.

34. Part of that area is occupied by the right-of-way of a highway . . .

35. Another portion of that 5.3 acres has been designated by the State of New Jersey [as wetlands] . . .

36. Accordingly, that 5.3 acres is further reduced owing to physical and regulatory constraints on developments to 1.6 acres or 18/100ths 1% of the total land area of the Borough . . .

39. Accordingly, Keyport has, with Ord. 31-92, created a total, effective prohibition of adult entertainment uses by leaving no land within its boundaries legally, physically and practicably available for use as an adult entertainment use.

40. Lots 5 and 6 are unavailable for further reasons.

> 41. Lot 5 (together with lot 4) is owned by Jersey Central Power & Light Company and is developed for and used as an electrical substation . . . [and] it is assessed at $244,300.
>
> 42. Lot 6 . . . is developed with a single story brick industrial building which is occupied by a going industrial concern — Semcor . . . [and] the assessed value for the property is $1,122,400.

Affidavit of George A. Vansant, licensed Professional Planner and Land Surveyor, dated February 2, 1993, ¶¶ 32-36, 39-42 (hereinafter "Vansant Aff.").

2. LETTER OF RICHARD M. MASER

In direct contrast to the Vansant Affidavit, Richard M. Maser's February 17, 1993 letter asserts that Keyport's ordinance 31-92 does provide alternative means for free speech. Specifically, Richard Maser concludes that "[b]ased upon our review of the ordinance and zoned conditions, there are possible locations that could be purchased. These properties are currently developed in the industrial zone but could be purchased and converted to the use in question." Richard M. Maser's Letter dated February 17, 1993 at 1 (hereinafter "Maser Letter"). Disagreeing with various above-cited assertions in the Vansant Affidavit, Richard Maser stated:

> 7. We disagree with [Mr. Vansant's] statements in Item 39 since there is land area within its legal boundaries which would be

> available as an adult entertainment use in conformance with the Borough's ordinance.
>
> 8. Under item 40, the statement is made that "Lots 5 and 6 are unavailable for further reasons." There is no elaboration of why these are not available although these lots have some existing uses, this does not preclude them from being converted to a proposed adult entertainment use.
>
> 9. Likewise the same argument applie[s] . . . wherein [Vansant] indicates that Lots 5 and 6 are unavailable for an adult entertainment use. He makes no documentation of his reasons for these conclusions and it is our opinion that Lots 5 and 6 could potentially be utilized as an adult entertainment use and therefore the ordinance allows consideration of this use.

Id. at 1-2.

3. PHOTOGRAPHIC AND ZONING MAP EXHIBITS

To fully comprehend what lots are allegedly available for "adult entertainment uses," and to clarify the experts' conflicting opinions, a review of the submitted photographic exhibits P-3, P-4 and P-5 and zoning map exhibits D-3A, P-2 and P-6 is essential. The photographic and zoning map exhibits reveal that Keyport's industrial-zoned area is fully accessible by a paved road — Madison Street. In fact, the four proposed lots which would allow for "adult entertainment uses" — lots 3, 4, 5, 6 —

all abut Madison Street. Moreover, all four lots have full access to utilities.

Upon reviewing the photographic exhibits, it is apparent that the four lots in question are viable for various commercial uses. On lot 3 there is a fully-operational gas station and automobile junkyard, lot 4 is an undeveloped wooded tract of land, on a portion of lot 5 there is a utility-power substation and occupying lot 6 is a fully-functioning construction equipment rental enterprise. Although an "adult entertainment use" may not occupy the entire portion of any of lots 3, 4, 5, or 6 due to Keyport's 300 foot residential setback requirement[1] and New Jersey wetland restrictions, Keyport's zoning ordinance 31-92 does allow for an "adult entertainment use" on a portion of all these industrial-zoned tracts of land. Therefore, some portion of lots 3, 4, 5 and 6 could potentially be purchased for an "adult entertainment use."[2] In fact, during the September 15 and 17, 1993 evidentiary hearing, Keyport's counsel stipulated that these lots could have more than one use and therefore there is no need to subdivide these tracts of land.

---

1. Brian J. Mullen, counsel for Keyport, stipulated that on September 15, 1993, Keyport amended its zoning ordinance 31-92 to have a 300 foot residential setback requirement as opposed to a 500 foot residential setback requirement. *See* Memorandum and Order dated July 15, 1993 at 10. The Borough of Keyport's Planning Board, however, recommended that the residential setback requirement of ordinance 31-92 be reduced from a 1000 feet to 500 feet, expanding the industrial-zoned area capable of housing an "adult entertainment use." *Id.* "At the council meeting on July 28, 1992, counsel adopted . . . Ordinance 31-92 as amended in light of the Planning Board's suggestions." *Id.*

2. Plaintiffs' expert, George A. Vansant notes that lot 5 is assessed at $244,300.00 and lot 6 is assessed at $1,122,400.00. Vansant Aff. at ¶¶ 41-42.

After reviewing the above-mentioned documents, this Court finds that Keyport's Madison Street industrial zone "consists of '[a]mple, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial [land]'. . . . That [plaintiffs] must fend for themselves in the [Keyport] real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54-55. Accordingly, because this Court finds Keyport's Ordinance 31-92 to be constitutional, this Court will deny plaintiff's motion for partial summary judgment.

C. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The grant of injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (citing *United States v. City of Philadelphia*, 644 F.2d 187, 191 n.1 (3d Cir. 1980)). When deciding such a motion, a court must consider four factors: (1) the moving party's likelihood of success on the merits; (2) the probability of irreparable injury to the moving party in the absence of relief; (3) the potential harm to the non-moving party; and, if applicable, (4) the public interest. *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111, 1116 (3d Cir. 1989) (citing *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982)). "Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue." *Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 192 (3d Cir. 1990) (citing *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)). Because this Court has found Keyport's zoning ordinance 31-92 to be

constitutional, plaintiffs cannot demonstrate a likelihood of success on the merits and the probability of irreparable injury. Accordingly, plaintiffs' application for a preliminary injunction is denied.

III. CONCLUSION

For the foregoing reasons,

It is on this 2nd day of February, 1994,

ORDERED that plaintiffs' motion for partial summary judgment and application for preliminary injunctive relief be and are hereby DENIED.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN JR., U.S.D.J.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JULY 15, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 93-0415 (GEB)

GEORGE PHILLIPS, et al.,

Plaintiff,

v.

BOROUGH OF KEYPORT, et al.,

Defendants.

MEMORANDUM AND ORDER

BROWN, District Judge

Before the Court are two motions to dismiss the complaint, one by the Borough of Keyport ("the Borough") and the other by the Board of Adjustment of the Borough ("the Board"). After considering all the papers and the oral arguments made by counsel on July 12, 1993, for the reasons set forth below the Court will grant the Borough's motion in part and deny the Board's motion.

BACKGROUND

This case is part of a phenomenon described three years ago by Justice Scalia:

Appendix D

[There has been] an increasing number of attempts throughout the country, by various means, not to withhold from the public any particular book or performance, but to prevent the erosion of public morality by the increasingly general appearance of . . . "sexually oriented businesses." Such businesses flourish throughout the country as they never did before, not only in New York's Times Square, but in much smaller communities from coast to coast. Indeed, . . . they reach even the smallest of communities via telephonic "dial-a-porn."

While many communities do not object to such businesses, others do, and have sought to eliminate them. Attempts to do so by focusing upon the individual books, motion pictures or performances that these businesses market are doomed to failure by reason of the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression. Communities cannot close down "porn-shops" by banning pornography (which, so long as it does not cross the distant line of obscenity, is protected) . . . . Consequently, communities have resorted to a number of other means, including stringent zoning laws [and] Draconian sanctions for obscenity which make it unwise to flirt with the sale of pornography. . . .

Appendix D

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 251-52 (1990) (Scalia, J., concurring in part) (citations omitted). In this case, the Borough, which is less than 1.5 square miles in size, is the small community that objects to the intrusion of sexually-oriented businesses. The Borough's chosen means is the stringent zoning law, specifically, local ordinances 30-92 and 31-92. The plaintiffs, Messrs. George Phillips and Philip Vitale, seek to open a shop called "X-tasy" and trade in nonobscene pornography within the Borough's boundaries. In February 1993, they filed this action, primarily seeking injunctive relief and a declaratory judgment that ordinances 30-92 and 31-92 violate the First and Fourteenth Amendments.

For the purpose of deciding these motions to dismiss the complaint, the Court takes as true all the allegations in the pleading. The Court also considers exhibits attached to the complaint or those upon which the complaint necessarily relies. *See* Fed. R. Civ. P. 10(c); *see, e.g., Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1561 (1992); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 109 n.20 (3d Cir.), *cert. denied*, 469 U.S. 831 (1984); *id.* at 113 (Becker, J., concurring).

The relevant documents indicate that the events leading to the action began in early 1992, when plaintiffs set their sights on an abandoned one-story building on Route 36 in the Borough. A property survey indicates that the building is one of three on the L-shaped piece of property formed by the intersection of three roads; the property fronts on Route 36 to the south, is bound by Pimper Place to the west, and is bound by Florence Avenue to the southeast. *See* Compl., Ex. K. The building is located in the southeast corner of the property, where Florence Avenue meets Route 36, on the lot identified as Block

103, Lot 61. Next to the building is a "go-go" bar known as "The Body Shop," which sits on the corner of Route 36 and Pimper Place. *Id.* ¶ 13 & Exs. K & M.[1] Apparently, "The Body Shop" also sits on Block 103, Lot 61. *See* Letter from Barreca to Board of 4/15/92, at 2 (Borough's Br., Ex. E) The third building is to the north-northwest of "The Body Shop," along Pimper Place, on the lot identified as Block 103, Lot 59.

Plaintiffs visited the site and noticed a construction permit posted on the window of one of the buildings. According to the complaint, the permit was posted on the window of the vacant commercial building with the address of 65 Route 36. Compl. ¶ 13. While this suggests that the building displaying the permit was the one involved in this action, it is not possible to determine. The permit, issued in November 1990 to Mr. Joseph Palazzolo as owner in fee, indicated that the work site location was "63 65 Route 36," identified the property as Block 103, Lot 59, and described the work to be performed as various interior renovations for the purpose of establishing a pizzeria.[2] The building permit was signed by Mr. Victor Rhodes, the Borough's construction official and zoning officer. *Id.* 13, Ex. A.

Plaintiffs allege that they checked the Borough's land use

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1. The complaint indicates that the go-go bar is located immediately to the north of the property, but the survey attached as Exhibit K suggests that the bar is immediately to the west.

2. Mr. Palazzolo is also the president of Chris Lind Management, Inc., from which plaintiffs eventually leased the property involved in this action. *See* Compl., Ex. E. According to a newspaper report, Mr. Palazzolo also owns "The Body Shop." *Id.*, Ex. M. It is not clear who owns the third building, the one that actually sits on Block 103, Lot 59.

regulations and determined that the property was located in a "highway commercial" district. *Id.* ¶ 15. Although the property known as 65 Route 36 may indeed be located in such a district,[3] it appears that Block 103, Lot 59, is located in a "residential" district. *See* Letter from Barreca to Board of 4/15/92, at 1 (Borough's Br., Ex. E). After checking the regulations, plaintiffs met with Mr. Palazzolo in order to negotiate a lease of the property. They agreed that if plaintiffs could obtain a zoning permit for the intended use of the property, they would execute a lease. *See* Compl. ¶ 18.

Mr. Phillips contacted Mr. Rhodes and requested that he perform an unofficial inspection of the property and advise plaintiffs what they would need to do in order to obtain a certificate of occupancy. Following a visit to the property on February 18, 1992, Mr. Rhodes advised plaintiffs that they would have to comply with various requirements regarding designation of parking places. *Id.* ¶¶ 20-21. A week later, plaintiffs submitted to Mr. Rhodes application No. 1284 for a zoning permit to "operate a retail book store w/ novelties — amusements & videos." Plaintiffs identified the property as "#65 Hwy. 36" and "Block 103, Lot 59, Zone H/C." *Id.* ¶ 22 & Ex. B. The complaint alleges that Mr. Rhodes retrieved an old survey of the property and attached it to the application. *Id.* ¶ 23. The survey plainly states that it is a survey of "Lots 59 & 61, Block 103 of the Official Tax Map of the Borough of Keyport," and it plainly indicates which part is Lot 59 and which is Lot 61. *Id.*, Ex. C. Shortly thereafter, Mr. Rhodes telephoned Mr. Vitale and requested that he clarify the nature of plaintiffs' intended use of the property. Mr. Vitale complied by coming to Mr. Rhodes's office and more specifically describing the intended

3. Unfortunately, there is nothing in the record that matches street addresses with lot numbers.

use in writing as, "(1) video sales & rentals"; (2) "amusements = adult video arcade"; and (3) "no one under 21 years of age admitted." *Id.* ¶¶ 24-25 & Ex. D. The complaint alleges that on March 9, 1992, plaintiffs appeared at Mr. Rhodes's office, and he issued them zoning permit No. 921 for Block 103, Lot 59. *Id.* ¶ 27.[4]

On March 13, 1992, plaintiffs, as lessees, and Mr. Palazzolo, as lessor, entered into a five-year lease for "that portion of the premises known as Block 103, Lot 59 also known as 65 Highway 36." Plaintiffs agreed to use the premises for "video sales and rental, amusements and adult video arcade. No one under 21 years of age admitted to premises," as "a retail adult book store with novelties and gifts," and not to use the premises for any other purpose without the written consent of the lessor. *Id.* ¶ 28 & Ex. E. Plaintiffs also agreed to "obtain any and all necessary government permits and approvals to conduct the business as deemed necessary by such governmental entities." *Id.*, Ex. E. Five days later, on Thursday, March 18, 1992, Mr. Rhodes issued plaintiffs three construction permits under their zoning permit No. 921. *Id.* ¶ 30 & Exs. F-1 to F-3. Plaintiffs allege that they thereafter "expended substantial sums of money" to repair and renovate the property for their intended use. *Id.* ¶ 31.

By this time, word of plaintiffs' plans had gotten around the Borough. A newspaper story reported that at a Borough council meeting on Tuesday, March 23, Mr. Charles Barreca, who lives directly behind the property plaintiffs leased, said he would do all he could do to stop plaintiffs from opening their

4. There is some doubt about the date the permit was issued. Exhibit H to the complaint, a stop construction notice, indicates that zoning permit No. 921 was issued on March 25, 1992.

proposed store and that he had begun to circulate a petition in the area. *Id.*, Ex. G. The Borough attorney explained at the meeting that the Board could review and overturn Mr. Rhodes's decision to issue the zoning permit. During the few days following the meeting, various Borough leaders, including the mayor, the high school principal, and board of education members, expressed opposition to the plaintiffs' plans. The Board announced that it would review the matter at its meeting on April 20, 1992. *Id.*

Within a week, Mr. Barreca appealed Mr. Rhodes's decision to issue zoning permit No. 921. *See* N.J. Stat. Ann. § 40:55D-72. The complaint alleges that the appeal was filed on March 29, a Sunday. Compl. ¶ 33. On April 2, 1992, Mr. Rhodes issued and posted a stop construction notice, ordering plaintiffs to stop work at "Block 103, Lot 61, 65 Hwy 36" until the appeal was resolved. *Id.* ¶ 34 & Ex. H. On April 13, 1992, plaintiffs filed an action in New Jersey Superior Court, Docket No. MON-C-113-92, and obtained an order to show cause why the stop construction notice should not be vacated. They also sought, but did not obtain, temporary restraints. *See* Board's Br., Ex. B-1.

On April 14, 1992, plaintiffs, in their name and as "X-tasy," filed a second application for a zoning permit, No. 1303, indicating that it was for "#65 Highway 36, Block 103, Lot 61, Zone H/C," and that they sought "to operate a retail bookstore w/ novelties, amusements & videos, adult video arcade, video sales & rentals (no one under 21 years of age admitted)." Compl. ¶ 35 & Ex. I.

On April 20, 1992, the Board decided Mr. Barreca's appeal of the decision to issue the first zoning permit, No. 921. Plaintiffs

were represented by counsel, and appellant appeared together with another citizen to urge reversal. Plaintiffs' counsel conceded that the permit had been issued for Block 103, Lot 59, which was in a residential district, and that plaintiffs' intended use was not permitted in such a district. *See* Board's Br., Ex. A, at 2, ¶ 3. Mr. Barreca and his supporter submitted eight photographs showing that the present condition of the plaintiffs' proposed building and site differed from the conditions represented on the old survey attached to their application for the zoning permit. On the basis of this evidence, the Board granted the appeal and reversed Mr. Rhodes's decision to issue zoning permit No. 921. *See id.*, at 3-4, ¶¶ 7-8; Compl. ¶ 36.

By letter dated April 28, 1992, Mr. Rhodes advised plaintiffs that their second application for a zoning permit, No. 1303, had been denied due to (1) inaccuracies in the survey they had submitted with the application and (2) reports from a previous tenant that the sewer line servicing the building did not work. Compl. ¶ 37 & Ex. J. Plaintiffs undertook to correct the problems and on June 16, 1992, they submitted a third application for a zoning permit, No. 1322, together with a revised survey and receipts for sewer line repairs. *Id.* ¶¶ 38-40 & Exs. K to L-3. On June 18, 1992, an executed stipulation of dismissal was filed in the Superior Court, dismissing the plaintiff's action to vacate the stop construction notice. *See* Board's Br., Ex. B-2.

At the Borough council meeting on June 23, 1992, council proposed the two ordinances challenged in this action, Nos. 30-92 and 31-92.[5] Ordinance 30-92 would prohibit female

5. When proposed, the ordinances had different numbers. For the sake of clarity, the Court will refer to them by their designated numbers upon adoption.

topless and bottomless exhibitions and male bottomless exhibitions, and Ordinance 31-92 would restrict adult entertainment uses to industrial districts and prohibit them within 1000 feet of residential zones. Under the proposed scheme, plaintiffs would need a use variance to open their store, because they were in a highway commercial district. Public hearings on the proposed ordinances were scheduled for July 14, 1992. Compl. ¶¶ 42-43 & Ex. M. Pursuant to N.J. Stat. Ann. §§ 40:55D-26 and -64, council referred Ordinance 31-92 to the Borough Planning Board for review. *See* Borough's Br., Ex. C.

A month having passed without a decision on their third application for a zoning permit, on July 14, 1992, plaintiffs filed another action in the Superior Court, docket number MON-L-5016-92, which was an action in lieu of prerogative writ against Mr. Rhodes, the Borough, and the Borough's mayor. The complaint alleged that Mr. Rhodes was, at the mayor's direction, delaying decision on the application. Plaintiffs sought to compel Mr. Rhodes to issue the permit, and they sought damages from the mayor. Compl. ¶ 45 & Ex. N.

That same evening, the Borough council formally introduced the two ordinances. They were adopted by unanimous vote, and council authorized that they be published in the newspaper on July 16, with notice that public hearings would be held on July 28. *Id.*, Ex. P.

On July 23, 1992, the Borough Planning Board held a public meeting to consider the proposed Ordinance 31-92. The board had earlier solicited and reviewed a legal opinion concerning the ordinance, and at the hearing it heard an oral report by an engineering expert. The board made various

findings about the definition of "adult entertainment uses," about the negative impact such uses would have on the Borough, and about the suitability of locating such uses in industrial districts.[6] It recommended that council pass the proposed ordinance with three changes, the most significant of which was to reduce the "buffer zone" from 1000 to 500 feet. *See* Borough's Br., Ex. C.

At the council meeting on July 28, 1992, council adopted Ordinance 30-92 as proposed and Ordinance 31-92 as amended in light of the Planning Board's suggestions. The first, entitled "Public Indecency" and apparently patterned after the Indiana statute recently upheld by the Supreme Court in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), prohibits topless and bottomless female exhibitions and bottomless male exhibitions. Section 20.2 of the ordinance, entitled "Findings," provides:

> The Borough of Keyport has given due consideration to the character of the borough as a whole and makes the following findings:
>
> The Borough of Keyport is a small, completely developed and to a great extent a bedroom community. The commercial areas of the community are not isolated from the residential areas and are limited in size, location and space, with commercial activities designed to serve the needs of residential customers rather than transient traffic. Said commercial areas are in relatively close proximity to the primary and secondary

6. The Court does not set forth the board's findings because they were eventually adopted into the ordinance, which is set forth below.

> schools, child-care centers, the churches in the borough and the other community-oriented activities within the borough. Pedestrian traffic using the sidewalks in the commercial areas of the borough is for the most part made up of residents of the borough, including substantial numbers of primary and secondary school children going to and from a school, as well as shoppers at the retail commercial establishments. Moreover, the Borough Council is further of the opinion that public indecency would have a direct harmful impact upon the health, safety, welfare and order of not only the adult residents of the borough but also the children within the borough.

Ord. 30-92, § 20.2 (Compl., Ex. V). The minutes of the council meeting indicate that, although the meeting was open to public for comments, none were made on Ordinance 30-92 before it passed. Compl., Ex. Q.

Ordinance 31-92, which amended Chapter XXV of the Borough's Land Use Regulations, provides in relevant part:

> SECTION 2.
> 25:1-15.15 Adult Entertainment Uses[7]

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7. Section one of the ordinance defines Adult Entertainment Uses to include adult bookstores, adult motion picture theaters, adult mini motion picture theaters, and cabarets dealing in material which is "distinguished or characterized by an emphasis on . . . specified sexual activities or specified anatomical areas." Such activities are defined as "human genitals in a state (Cont'd)

Appendix D

(a) In the development and execution of this section it is recognized that there are certain uses which, because of their very nature, are recognized as having serious objectionable operational characteristics.

These uses create and promote a deleterious effect on the Borough's neighborhood characteristics, administration of schools, and the commercial and economic viability of the community. These uses impact on the Borough's neighborhood areas and conflict with the intent of the Borough Master Plan, particularly those segments listed on pages 16 and 19 therein which provide that a primary zoning objective is to preserve and protest [sic] existing residential areas and to enhance the desirability thereof. Adult Entertainment Uses are such uses.

The Borough of Keyport is a small residential community with its commercial areas and zones highly integrated with its residential properties. The commercial properties are in close proximity to its educational, religious,

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(Cont'd)

of sexual stimulation or arousal; acts of human masturbation, sexual intercourse or sodomy; and fondling or other erotic touching of human genitals, pubic region, buttock or female breast." Such anatomical areas are defined as "less than completely and opaquely covered human genitals, pubic region, buttock or female breast below a point immediately above the top of the areola; and human male genitals in a discernibly turgid state, even if completely and opaquely covered."

residential and youth recreation facilities with a high volume of pedestrian activity, including children throughout the area.

The industrial zone as it exists is not comprised of major industrial operations, but of mixed use nature including retail/ commercial uses, it is so situated as to provide easy access and highway exposure. The industrial zone is suitably distant and buffered from the residential and mixed commercial zones as to minimize a negative or deleterious effect.

In order to prevent the deterioration of the community, to preserve the neighborhoods of the Borough of Keyport, to ensure the economic prosperity of the community, and to provide for the protection and well being of the quality of life in the Borough of Keyport, certain regulations are necessary to prevent these adverse effects.

(b) Adult Entertainment Uses are prohibited in all zones, except where expressly permitted.

(c) In such zones where Adult Entertainment Uses are expressly permitted, no Adult Entertainment Use shall be located:

(a) within 500 feet of any residence, residential use and/or residential zone; or

(b) within 500 feet of any of the following uses:

1. Churches, monasteries, chapels, synagogues, convents, rectories, religious article or religious apparel stores, or any religious use; or

2. Schools, up to and including the twelfth (12) grade, and their adjunct play areas; or

3. Public playgrounds, public swimming pools, public parks and public libraries.

SECTION 3.

25:1-12.1 Industrial District (I)

i. Adult Entertainment Uses.

Ord. 31-92, §§ 2-3 (Compl., Ex. O). The minutes of the council meeting indicate that only the Borough counsel offered a comment on Ordinance 31-92, reporting the planning board's recommended changes (which were adopted) and stating that the mayor had disqualified himself at the planning board meeting. Compl., Ex. Q.

On September 9, 1992, Mr. Rhodes inspected plaintiffs' property while they were present. By letter of that date, he informed them that their third application for a zoning permit,

No. 1322, was denied because (1) they lacked adequate parking, (2) a site plan was required, and (3) "31-92 Section 2 25:1-15.15.b Adult Entertainment Uses." Compl. ¶ 53 & Ex. T.[8] Plaintiffs appealed the denial, and on October 19 and November 16, 1992, the Board held public hearings on the appeal. Mr. Phillips testified on behalf of the plaintiffs. The Board found that plaintiffs' proposed use fell within the definition of Adult Entertainment Uses and that such uses were prohibited in a highway commercial district, where plaintiffs' property was situated. The Board also found that plaintiffs failed to demonstrate that Mr. Rhodes erred regarding the issues of inadequate parking and the need for a site plan. On December 21, 1992, the Board voted 5-0 to affirm Mr. Rhodes's decision and to deny plaintiffs' appeal. *Id.* ¶¶ 54-57 & Ex. U.

Plaintiffs filed this action on February 4, 1993, together with an application for a preliminary injunction. The complaint asserts the following four causes of action:

> *Count One*: Ordinance 92-31 is unconstitutional as written and as applied, because it violates plaintiffs' rights to freedom of expression under the First and Fourteenth Amendments; it deprives them of their right to just compensation for a taking of property under the Fifth Amendment; it violates their rights not to be deprived of liberty or property without due process of law as guaranteed under the Fourteenth Amendment; and it violates their rights to equal protection of the laws as guaranteed under the First and Fourteenth Amendments.

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8. Two days later, the Superior Court entered an order in docket number MON-L-5016-92, denying a motion to dismiss, directing Mr. Rhodes to act on the zoning application (although the issue apparently was by then moot), and dismissing the complaint without prejudice. Compl. ¶ 52 & Ex. S.

Count Two: Ordinance 92-30 and Ordinance 25:1-13[9] are unconstitutional as written and as applied, because they violate plaintiffs' rights to freedom of expression under the First Amendment; and they violate their rights to equal protection of the laws as guaranteed under the Fourteenth Amendment.

Count Three: Mr. Rhodes's decision to deny the zoning application, and the Board's subsequent affirmance, was an abuse of discretion and was arbitrary, capricious, and unreasonable.

Count Four: Defendants are equitably estopped from enforcing the ordinances and preventing plaintiffs from completing their construction and opening their store because Mr. Rhodes granted their first application for a zoning permit and issued construction permits, and plaintiffs relied on his actions to their detriment.

Plaintiffs seek injunctive relief, a declaration that the ordinances are invalid and may not be enforced against them, money damages, and attorney's fees.

On February 19, 1993, after plaintiffs had served the defendants, the Court conducted a telephone conference with counsel. It was agreed that the defendants would respond to the complaint by filing motions to dismiss for failure to state a claim, which the court would hear on March 29, 1993. On

9. Ordinance 25:1-13 provides that all uses not expressly permitted in the various zone districts are prohibited. Plaintiffs claim that no regulation expressly permits live entertainment. In addition, they state that Ordinance 25:1-13.5 exempts from the live entertainment prohibition public events sponsored by the Borough and nonprofit entities domiciled in the Borough.

March 8, 1993, plaintiffs' counsel initiated another telephone conference call with the Court and requested that before drafting opposition to the defendants' motions he be permitted to take discovery of public records in the Borough's possession. The Court granted the request and adjourned the motions to dismiss without date. On April 1, 1993, the Board filed a motion to limit discovery, which Magistrate Judge Wolfson granted by Order dated May 26, 1993. On June 3, 1993, the Court held another telephone conference with counsel and established a briefing schedule, setting the motions down for July 12, 1993. When plaintiffs' counsel served his opposition to the motions, he purported to move for summary judgment as well, and submitted a combined brief well in excess of the page limits of Local Rule 27. Thus, the Court conducted another telephone conference on June 16, and ruled that only the motions to dismiss would be heard on July 12 and the motion for summary judgment would be set down for August 16, 1993, together with plaintiffs' motion for a preliminary injunction. The Court heard oral argument on July 12,[10] and now resolves the motions to dismiss.

DISCUSSION

A. *Standards for Motion to Dismiss*

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986);

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10. Neither Mr. Rhodes nor his counsel appeared. Apparently, the matter was referred to an insurer. The Borough's counsel indicated that his motion was intended to cover Mr. Rhodes as well.

Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro*, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In setting forth a valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

B. *The Board's Motion (Count Three)*

Counsel agreed at oral argument that only count three of the complaint concerns the Board. The Board persuasively argues that its only involvement was to reverse the initial grant of a zoning permit (No. 912) and to affirm the denial of the third one (No. 1322), and that both decisions were proper under the law. At oral argument, plaintiff's counsel explained that he named the Board only to preserve his cause of action in the event that the Court strikes down the ordinances, *i.e.*, plaintiffs want to be able to argue that the alternative grounds for the Board's denial of the third application (lack of a site plan and inadequate parking) were arbitrary and capricious. It is not likely that plaintiffs can convert this claim into a federal cause of action. *See, e.g., PFZ Properties v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 112 S. Ct. 414 (1991), *cert. dismissed as improvidently granted*, 112 S. Ct. 1151 (1992). If the Court does eventually rule against plaintiffs on their federal claims, it is equally unlikely that the Court will decide to exercise supplemental jurisdiction over what is in essence a state law action in lieu of a prerogative writ. Nonetheless, because the

Court has not so ruled, and plaintiffs' counsel agreed at oral argument that the Board need not participate in the case until and unless the third cause of action becomes important, the Court will deny the Board's motion without prejudice.

C. *Ordinance 30-92 (Count Two)*

Plaintiffs state in one place in their complaint that they "wish to utilize their leased premises for the exhibition of live adult-theme entertainment." Compl. ¶ 66. Plaintiffs' counsel devotes a substantial portion (28 pages) of his brief in opposition to these motions arguing that Ordinance 30-92 and Ordinance 25:1-13 are invalid. However, the undisputed facts of this case are that plaintiffs, having submitted three applications for a zoning permit, never sought to provide live entertainment, and indeed their lease expressly prohibits them from doing so. When the Court indicated at oral argument the existence of a glaring standing problem, plaintiffs' counsel replied that it was unnecessary for plaintiffs to seek to use their premises for live entertainment, because they were certain to be denied a use variance, and one need not "flaunt the requirement" or undertake an effort that was certain to be futile. While this argument is colorable, echoing as it does, for example, Justice Douglas's dissents in *Laird v. Tatum*, 408 U.S. 1 (1972), and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), the Court finds it to be without merit and will dismiss Count Two for lack of standing. *See FW/PBS, Inc.*, 493 U.S. at 230-36.

D. *Equitable Estoppel (Count Four)*

Plaintiffs allege that they obtained their first zoning permit on March 9, 1992, entered into a lease on March 13, 1992, obtained construction permits on March 18, 1992, and, thinking

they were in business, expended "substantial sums of money" to renovate the building. The record also reflects, of course, that by March 23 citizens were appearing at council meetings and expressing opposition to their plans, and that same week civic leaders likewise were publicly resolving to block them. To prevail on count four, plaintiffs must show that, to their detriment, they changed their position in reasonable reliance on the representation of another. The Borough argues that, to demonstrate reasonable reliance on a wrongly issued permit sufficient to estop revocation, one should at least wait until the time for appeal has run. *See Lizak v. Faria*, 96 N.J. 482, 499 (1984). Nonetheless, the Court cannot say that plaintiff has failed to state a claim, and will therefore deny the motion to dismiss.

E. *Ordinance 31-92 (Count One)*

Here lies the heart of plaintiffs' case. That heart is the First Amendment. Plaintiffs also allege a denial of equal protection, due process, and a taking of their property, and the Court will address these first.

Plaintiffs "can fare no better under the Equal Protection Clause than under the First Amendment itself," thus the Court will dismiss that claim. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 55 n.4 (1986).

As to the taking claim, plaintiffs had no vested right to operate their business contrary to local zoning laws, and the lease itself (it is their leasehold interest that plaintiffs allege they are deprived of) provides that they "shall obtain any and all necessary government permits and approvals to conduct the business as deemed necessary by such governmental entities." By signing the lease, plaintiffs did not obtain by operation of

law a property interest in merchanting nonobscene pornography, they merely obtained a right to possession and use of the property. If plaintiffs cannot put their property interest to economic use, that is attributable not to the ordinance but to the narrow use provision they bargained for in the lease. Plaintiffs have not alleged that the lessor will not consent to alternative uses; further, if the Court upholds the ordinances and the lessor refuses to consent, plaintiffs could likely invoke the doctrine of frustration of purpose and walk away from the deal. Thus, the Court will dismiss the taking claim.

With regard to the due process claims, the Court finds them equally meritless because plaintiffs had available and elected not to pursue state procedural remedies. *See PFZ Properties*, 928 F.2d at 30-31. To the extent that plaintiffs allege a denial of substantive due process, the Court finds that defendants' actions do not "shock the conscience," *id.* at 31, and in any event the Supreme Court has held that where there is an explicit textual constitutional provision addressing the alleged wrongs — as there is here in the form of the First Amendment — it must be the guide for liability rather than "the more generalized notion of 'substantive due process.' " *Graham v. Connor*, 490 U.S. 386, 390 (1989).

Plaintiffs' viable claim is that Ordinance 31-92 violates their First Amendment rights. Operating a bookstore, including one that trades in pornographic but nonobscene material, is afforded protection by the First and Fourteenth Amendments to the United States Constitution. When a regulation, such as the one challenged here, impinges on a protected business, it must be subjected to the analysis set forth by the Supreme Court in *Renton*, 475 U.S. 41, and *Young v. American Mini Theatres*, 427 U.S. 50 (1975).

Appendix D

In *Young*, the Court upheld an ordinance which provided, *inter alia*, that an adult theater could not be located within 1000 feet of any two other "regulated uses," or within 500 feet of a residential area. "Regulated uses" included sexually oriented bookstores and theaters, cabarets, bars, dance halls and hotels restricted to an adult clientele. A plurality opinion written by Justice Stevens reasoned that the lines drawn by the ordinance were justified by the City's legitimate interest in preventing urban blight and crime. Arguing that ultimately what was at stake was "nothing more than a limitation on the place where adult films may be exhibited," *Young*, 427 U.S. at 71, the Supreme Court held that the ordinance did not violate the First and Fourteenth Amendments.

In *Renton*, the Supreme Court reviewed a theater owner's challenge to a city zoning ordinance, similar to the one here, that prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park or school. The Supreme Court held that the ordinance was a valid time, place and manner restriction enacted in response to serious problems created by sexually oriented picture theaters, rather than a restriction on the content of speech. Drawing extensively from *Young*, the *Renton* Court said " 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. Applying these standards, the Supreme Court held that the ordinance was content-neutral and, by its terms, was designed to fulfill the City's substantial interest in protecting the community and the quality of its urban life.

Appendix D

1. *Content Neutral*

The first question in a First Amendment challenge to a zoning ordinance is whether the legislation at issue is a content-based restriction, or a content-neutral time, place and manner restriction. The *Renton* Court defined "content-neutral" speech regulations as those that "are justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Since the *Renton* Court found the ordinance, by its terms, designed to address the secondary negative effects of "adult motion picture theaters" rather than to suppress the expression of unfavorable or controversial views, the challenged zoning ordinance was held to be a valid "content-neutral" regulation. *Young* and *Renton* both recognize that a community may regulate the effects of sexually oriented businesses without engaging in content-based regulation. *See FW/PBS, Inc.*, 493 U.S. at 244 (White, J., concurring in part) ("*Renton* and *Young* also make clear that there is a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them and that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral.").

The same may be said here. Ordinance 31-92 is a content-neutral time, place and manner regulation. In deciding this issue, the Court does not seek out impermissible legislative motives, but looks to the face of the ordinance for permissible governmental interests unrelated to the suppression of speech. *See United States v. O'Brien*, 391 U.S. 367, 393 (1968). Ample legitimate interests are recited in Ordinance 31-92, as well as in its companion ordinance enacted the same day.

Regardless of the ordinance's focus on the secondary effects of nonobscene pornographic businesses, it has an incidental impact on speech-related activities that are, in some measure, protected by the First Amendment. The relevant inquiry, then, is "whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50.

2. *Substantial Governmental Interest*

The *Young* Court recognized that a community's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young*, 427 U.S. at 71 (plurality opinion); *see id.* at 80 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial."); *see also Renton*, 475 U.S. at 50. Governments also have a substantial interest in shielding minors from sexually explicit materials which are not considered obscene as to adults. *See Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (state's "interest in the well-being of its youth" justifies some limitation on First Amendment).

The Court finds that Keyport's stated interests are substantial. Plaintiffs essentially argue that the reasons are mere pretext, for the Borough council did not commission studies or take evidence at the public hearings on the possible effects of opening its doors to businesses trading in pornographic nonobscene materials. This was the argument made by the appellate court and by Justice Brennan in his *Renton* dissent, but the majority of the Supreme Court stated that "[t]he First Amendment does not require a city, before enacting such an [adult theater zoning] ordinance, to conduct new studies or produce evidence independent of that already generated by other

cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. At least one Court of Appeals has suggested that "legislative findings are no longer necessary, as the record as to secondary effects has already been made." *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1258 n.1 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1845 (1993). Although the Borough's findings may have been a bit conclusory, they were at least as specific as those in *Renton* and the Court finds them sufficient. *See, e.g., D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146 (4th Cir. 1992); *International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520, 1527 (11th Cir. 1986); *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980).

3. *Reasonable Alternative Means*

Finally, the Court considers whether Ordinance 31-92 "effectively den[ies] [plaintiffs] a reasonable opportunity to open and operate" their store within the borough. *Renton*, 475 U.S. at 54. This is a factual issue that cannot be resolved by a motion to dismiss. Counsel are advised that the August 16, 1993, hearing on plaintiffs' application for a preliminary injunction will focus on this issue, as framed by the Vansant Affidavit submitted by plaintiffs and the Maser Letter attached as Exhibit D to the Borough's brief.

CONCLUSION

For the foregoing reasons,

It is this 15th day of July, 1993,

Appendix D

ORDERED that the Keyport Board of Adjustment's motion to dismiss the complaint be and is hereby DENIED; and it is

FURTHER ORDERED that the Borough of Keyport's motion to dismiss the complaint be and is hereby GRANTED with respect to count two and with respect to all claims in count one other than those under the First Amendment, and DENIED with respect to the First Amendment claims in count one and with respect to counts three and four.

s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING SUR PETITION FOR REHEARING DATED JUNE 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5143

GEORGE PHILLIPS; PHILIP VITALE

Appellants

v.

BOROUGH OF KEYPORT; VICTOR RHODES; BOARD OF ADJUSTMENT

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and ROSENN,* *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

---

* Hon. Max Rosenn, Senior U.S. Circuit Judge, was a member of both the original panel and the en banc panel.

Appendix E

By the Court,

s/ Walter K. Stapleton
Circuit Judge

Dated: JUN 3rd 1997

APPENDIX F — CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

Constitutional Provision Involved

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

United States Constitution Amendment 1

Ordinance Involved

Borough of Keyport Ordinance No. 31-92

AND [SIC] ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER XXV OF THE REVISED CODE OF THE BOROUGH OF KEYPORT, LAND USE REGULATIONS. ORD. NO. 29-92

BE IT ORDAINED by the Mayor and Council of the Borough of Keyport, County of Monmouth and State of New Jersey that Chapter XXV, Land Use Regulations, of the Revised General Code of the Borough of Keyport be and the same are amended and supplemented as follows:

25:1-3 Definitions.

ADULT ENTERTAINMENT USES, INCLUDE:

(1) ADULT BOOKSTORE — An establishment having as a substantial or significant portion of its stock in trade books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities are specified anatomical areas, as defined below, or an

establishment with a segment or section devoted to the sale or display of such material.

(2) ADULT MOTION PICTURE THEATER — An enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined below, for observation by patrons therein.

(3) ADULT MINI MOTION PICTURE THEATER — An enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined below, for observation by patrons therein.

(a) For the purpose of this subsection, "specified sexual activities" is defined as human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse or sodomy; and fondling or other erotic touching of human genitals, pubic region, buttock or female breast; and "specified anatomical areas" is defined as less than completed and opaquely covered human genitals, pubic region, buttock or female breast below a point immediately above the top of the areola; and human male genitals in a discernibly turgid state, even if completed and opaquely covered.

(4) CABARET — An establishment which features go-go dancers, exotic dancers, strippers, or similar entertainers.

Appendix F

25:1-15.15 Adult Entertainment Uses

(a) In the development and execution of this section it is recognized that there are certain uses which, because of their very nature, are recognized as having serious objectionable operational characteristics.

These uses create and promote a deleterious effect on the Borough's neighborhood characteristics, administration of schools, and the commercial and economic viability of the community. Adult Entertainment Uses are such uses.

In order to prevent the deterioration of the community, to reserve the neighborhoods of the Borough of Keyport, to ensure the economic prosperity of the community, and to prove for the protection and well being of the quality of life in the Borough of Keyport, certain regulations are necessary to prevent these adverse effects.

(b) Adult Entertainment Uses are prohibited in all zones, except where expressly permitted.

(c) In such zones where Adult Entertainment Uses are expressly permitted, no Adult Entertainment Use shall be located:

~~(a) within 1,000 feet of any~~ residence,

residential use and/or residential zone; or

(b) within 1,000 feet of any of the following uses:

1. Churches, monasteries, chapels, synagogues, convents, rectories, religious article or religious apparel stores, or any religious use; or

2. Schools, up to and including the twelfth (12) grade, and their adjunct play areas; or

3. Public playgrounds, public swimming pools, public parks and public libraries.

25:1-12.1 Industrial District (I)

I. Adult Entertainment Uses.

SECTION 4. REPEALER. All ordinances or parts thereof inconsistent with the provisions of this ordinance are hereby repealed as to such inconsistency.

SECTION 5. VALIDITY. Of any section, paragraph, subdivision, clause or provision of this ordinance shall be adjudged invalid, such adjudication shall apply only to the section, paragraph, subdivision, clause or provision so adjudged, and the remainder of this ordinance shall be deemed valid and effective.

Appendix F

SECTION 6. EFFECTIVE DATE. This ordinance shall take effect upon passage and publication according to law.

Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

No. 97-172

In The

Supreme Court of the United States

October Term, 1996

GEORGE PHILLIPS and PHILIP VITALE,

Petitioners,

vs.

BOROUGH OF KEYPORT, a political subdivision of the State of New Jersey, VICTOR RHODES, in his official capacity as Construction Official and Zoning Officer of the Borough of Keyport, and individually, BOARD OF ADJUSTMENT of the Borough of Keyport,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Third Circuit Court of Appeals properly remand to the district court this First Amendment challenge to an ordinance regulating adult entertainment uses in order to enable the defending municipality to demonstrate the secondary effects the municipality alleges the ordinance was designed to ameliorate and that the ordinance was thus based upon a content neutral governmental interest?

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STATEMENT OF THE CASE

A. Borough of Keyport Ordinance No. 31-92

This matter involves a challenge to an adult entertainment ordinance adopted by the New Jersey Borough of Keyport in 1992. The Ordinance No. 31-92 prohibits "Adult Entertainment Uses", *i.e.*, adult bookstores, adult motion picture theaters, adult mini-motion picture theaters and cabarets, in all zones, except where expressly permitted (A.7)[1]. Further, Ordinance No. 31-92 provides that, where such Adult Entertainment Uses are expressly permitted, no Adult Entertainment Use shall be located:

> (a) within 500[2] feet of any residence, residential use and/or residential zone; or
>
> (b) within 500 feet of any of the following users:
>
> 1. Churches, monasteries, chapels, synagogues, convents, rectories, religious artifice or religious apparel stores, or any religious use; or
>
> 2. Schools, up to and including the

---

1. The notation A.7 refers to the Appendix of petitioners at page 7. Respondents have not submitted a separate appendix and refer to that of petitioners throughout this brief.

2. During the district court proceedings below, this provision was amended to reduce this distance to 300 feet. Although the Third Circuit court ordered the district court to consider various aspects of both the 300-foot and the 500-foot version of the ordinance, these distances are not at issue in the within Petition.

> twelfth (12th) grade, and their adjunct play areas; or
>
> 3. Public playgrounds, public swimming pools, public parks and public libraries.

(A.9-10).

Respondent Keyport summarized its legislative findings and reasons for the adoption of the Ordinance in the introductory language of the Ordinance:

> In the development and execution of this section it is recognized that there are certain uses which, because of their very nature, are recognized as having serious objectionable operational characteristics.

(A.8).

> These uses create and promote a deleterious effect on the Borough's neighborhood characteristics, administration of schools, and the commercial and economic viability of the community. These uses impact on the Borough's neighborhood areas and conflict with the intent of the Borough Master Plan, particularly those segments listed on pages 16 and 19 therein which provide that a primary zoning objective is to preserve and protest [sic] existing residential areas and to enhance the desirability thereof. Adult Entertainment Uses are such uses.

(A.8).

The Borough of Keyport is a small residential community with its commercial areas zoned highly integrated with its residential properties. The commercial properties are in close proximity to its educational, religious, residential and youth recreation facilities with a high volume of pedestrian activity, including children, throughout the area.

(A.8).

The industrial zone as it exists is not comprised of major industrial operations, but of mixed use nature including retail/ commercial uses, it is so situated as to provide easy access to and highway exposure. The industrial zone is suitably distant and buffered from the residential and mixed commercial zones as to minimize a negative or deleterious effect.

(A.8-9).

In order to prevent the deterioration of the community, to preserve the neighborhoods of the Borough of Keyport, to ensure the economic prosperity of the community and to provide for the protection and well being of the quality of life in the Borough of Keyport, certain regulations are necessary to prevent these adverse effects.

(A.9).

B. The District Court

The Ordinance was challenged by petitioners, who sought to operate the X-TASY Bookstore, an adult book and video store in the Borough of Keyport (A.2). Specifically, petitioners advanced four arguments before the district court: (1) Ordinance No. 31-92 violates their right of free expression because it is not narrowly tailored to achieve a substantial, content-neutral governmental interest and because it does not leave adequate alternative channels of communication; (2) the Borough violated their right to substantive due process by revoking their original permits, by delaying action on their two subsequent applications, and by denying their third application based on Ordinance No. 31-92; (3) they are "prevailing parties" entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and (4) the Borough is equitably estopped from revoking their original permits (A.12).

Resolving motions to dismiss and motions for summary judgments advanced by both parties, the district court, in three separate orders, found that: (1) the Ordinance was content-neutral and narrowly-tailored; (2) the complaint failed to establish a substantive due process claim; (3) that petitioners Phillips and Vitale were not "prevailing parties"; and (4) that there was no equitable estoppel (A.12-14).

C. The United States Court of Appeals for the Third Circuit

Phillips and Vitale appealed the entire matter to the United States Court of Appeals for the Third Circuit, advancing the same four arguments that were before the district court (A.12). After briefing and oral argument, the circuit court ordered the parties to engage in a second argument *en banc* (A.1). Following the *en banc* argument, the court determined that, based upon deficiencies in the record before it, the district court was in no

position to render a final determination on either the content-neutral/alternative channels for communication claim or the substantive due process claim and remanded the matter to the district court for further proceedings on both claims (A.17-18, 27, 36). Further, the court determined that, only after the first two claims were properly determined could the district court definitively determine whether Phillips and Vitale were "prevailing parties" entitled to any attorneys' fees (A.37). The circuit court upheld the determination that there was no equitable estoppel (A.40, 41).

D. The Underlying Dispute

Petitioners are before this Court seeking review of the circuit court's treatment of the first argument listed above in which they claim that the ordinance is not constitutional because it is not narrowly tailored to achieve a substantial, content-neutral governmental interest (PB.1)[3]. Specifically, petitioners take issue with the following findings of the court below:

> . . . [W]e reject [appellants'] argument that they are entitled to a mandate requiring the entry of judgment in their favor on this claim. Phillips and Vitale read *Renton* and our decision in *Mitchell* as endorsing a *per se* rule that any governmental regulation of speech is invalid if the adopting entity did not have before it, at the time of adoption, evidence of the action taken. Thus, in appellants' view, a governmental entity may successfully defend a First Amendment challenge of the kind here mounted only if it can show that it was exposed, before taking action, to

3. The notation PB.1 refers to Petitioners' Brief at page 1. Similar notations are used throughout this brief.

> evidence from which one could reasonably conclude that the undesirable secondary effects would occur in the absence of legislative action and that the particular action taken was narrowly tailored to ameliorate those secondary effects. We find no such rule in *Renton*, *Mitchell*, or any other governing precedent.

(A.28).

> There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure. We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures. We perceive no justification in policy or doctrine

> for abandoning our traditional approach. Moreover, we believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of governments.

(A.28-29).

> If a legislative body can produce in court whatever justification is required of it under the applicable constitutional doctrine, we perceive little to be gained by incurring the expense, effort, and delay involved in requiring it to reenact the legislative measure after parading its evidence through its legislative chamber . . .

(A.29).

In response to this excerpt of the decision below, it is petitioners' contention that, once the court below determined that there was not enough pre-enactment evidence regarding secondary effects in the record, the court should have found for petitioners instead of remanding the matter back to the district court. Respondents submit that the court's decision was the only practical and logical way of dealing with its findings and that the decision is in accord with other third circuit decisions, those of other circuit courts and those of this Court.

REASONS FOR DENYING THE WRIT

Jurisdiction on writ of certiorari lies only where compelling reasons exist. Rule 10. Such reasons include where a United States Court of Appeals has entered a decision in conflict with a decision of another Court of Appeals or has decided an

important federal question in a way that conflicts with relevant decisions of this Court. Petitioners cite both of these jurisdictional grounds as reasons for granting the petition. As set forth below, contrary to petitioners' arguments, neither of these grounds exist, and this petition should be denied.

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

Petitioners argue that the United States Court of Appeals for the Third Circuit has rendered a decision that is in conflict with the decisions of at least eight other United States Courts of Appeals on the same important matter (PB.14). The eight cases cited by petitioners are the same eight cases cited by Judge Rosenn in his dissenting opinion (A.57, n.2). However, the facts of those cases, the treatment of them by the 11 judge majority in the opinion below and more recent cases from these and other circuits demonstrate that the Opinion below is consistent with the decisions of all other Courts of Appeals.

Citing to Judge Rosenn's dissent and the eight Courts of Appeals cases cited in a footnote therein, petitioners claims that "... if the same issue were squarely presented to the First, Fourth, Fifth, Sixth, Seventh Eighth, Ninth and Eleventh Circuits, all eight circuits would agree with the dissent." (PB.22, 23). In other words, petitioners contend that the opinions cited by them and Judge Rosenn demonstrate that those Courts of Appeals would have held for the petitioners finding the ordinance in question unconstitutional instead of remanding the matter to the district court for further proceedings. Such a contention is simply not true.

Petitioners and the dissenting opinion cite the following cases: *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995), *cert. denied*, 115 S. Ct. 2247 (1995); *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415, 1421-1423 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990); *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Christy v. Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); *Berg v. Health & Hospital Corp.*, 865 F.2d 797, 803-04 (7th Cir. 1989); *Postscript Entertainment v. Bridgeton*, 905 F.2d 223, 227 (8th Cir. 1990); *Tollis Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1163 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992). However, as the majority of the court below points out, six of these cases, *National Amusements*; *11126 Baltimore Blvd.*; *SDJ, Inc.*; *Berg*; *Postscript Enter.* and *International Eateries*, upheld the ordinance at issue and therefore simply "cannot stand for the principle that the lack of a legislative record is a fatal constitutional defect." (A.29-30, n.6). Consequently, just a cursory look at those six cases demonstrate that, contrary to petitioners' argument, they do not demonstrate that the opinion below is at odds with those of the First, Fourth, Fifth, Seventh, Eighth and Eleventh circuit courts.

A closer look at the remaining *Christy* and *Tollis* decisions removes the Sixth and Ninth circuit courts, respectively, from petitioners' list as well. In *Christy*, the plaintiff sought a preliminary injunction in the district court to enjoin the enforcement of the City of Ann Arbor's adult business zoning regulations. *Christy v. Ann Arbor*, *supra*, 824 F.2d at 489. Plaintiff alleged that the regulations unconstitutionally restricted the operation of his adult bookstore. *Id.* The district court denied the motion and plaintiff appealed. *Id.*

– Like the instant case, the Court of Appeals considered whether the Ann Arbor ordinance was designed to serve a substantial governmental interest. In doing so, the court determined the following:

> In the case at hand, the district court's opinion notes only that the city "has asserted that its purpose in passing this ordinance is to prevent the concentration of adult businesses and resultant urban blight." 625 F. Supp. at 967. Upon careful review of the record in this case, we find no such "assertion", nor do we find evidence of a legitimate government objective for the passage of this zoning ordinance. In the absence of any such evidence in the record, we conclude that the district court abused its discretion in finding that "the evidence that Ann Arbor offered [is] sufficient justification for this ordinance."

Id.

> In light of the errors which led to the district court's holding that plaintiff was unlikely to succeed on the merits, we VACATE the district court's order denying the preliminary injunction and REMAND this case for further proceedings consistent with this opinion.

Id. at 493 (emphasis in original).

This is exactly what has occurred in the instant case. Here, the Court of Appeals for the Third Circuit found:

> The district court concluded, on the basis of the legislative findings contained in Ordinance No. 31-92, that the Ordinance is an effort to suppress the secondary effects of sexually explicit expression and not sexually explicit expression itself. Apparently, it further tacitly concluded, without explanation, that Ordinance No. 31-92 was narrowly tailored to achieve that objective. We conclude that the district court was simply not in a position to make these findings.

(A.16).

* * *

> The judgment of the district court will be reversed and the case will be remanded for further proceedings consistent with this opinion.

(A.41). Thus, the court in the instant case did exactly what the *Christy* court did.

Similarly, in *Tollis*, the plaintiff sought a preliminary injunction in the district court to enjoin San Bernardino County from enforcing its "adult oriented business" ordinance. *Tollis v. San Bernardino County*, 827 F.2d 1329, 1330 (9th Cir. 1987). Plaintiff alleged that the ordinance unconstitutionally interfered with his right to operate an establishment that offered both live entertainment and adult movies. *Id.* at 1331.

It is important to note the precise issue that was in dispute in *Tollis*. In opposing the injunction, the County stated that it

interpreted the ordinance in such a way that a single showing of an "adult motion picture" would make a theater an "adult oriented business" for purposes of the ordinance. In response, the plaintiff contended that the ordinance as so construed was unconstitutionally overbroad on its face. *Id.* at 1331. The district court granted the preliminary injunction and the County appealed.

In finding against the County and affirming the district court's decision, the Court of Appeals for the Ninth Circuit stated:

> Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The County has thus failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time is sufficiently " 'narrowly tailored' to affect only the category of theaters shown to produce the unwanted secondary effects." *Renton*, 106 S. Ct. at 931. ***Nor do we see how the County could make such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects.*** We therefore affirm the district court's injunction against enforcing the ordinance as the County at present interprets it.

Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (emphasis added).

Thus, contrary to petitioner's arguments that the *Tollis*

decision supports its position in the instant case, the decision involves a unique factual situation that is not applicable to the facts herein. Further, the above-quoted language actually supports respondents' position in that it demonstrates that the court seriously considered whether or not the County ***could make a showing*** given the opportunity such as the opportunity provided by the third circuit here. It was only after determining that such a showing could not be made that the court affirmed the district court's injunction.

A closer look at the opinions of all of the Courts of Appeals demonstrates that, in fact, ***there is not one circuit*** with which the court's opinion below is inapposite.

A. The First Circuit

In *National Amusements v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995), in affirming the district court's summary judgment against an adult movie theater owner, the Court of Appeals acknowledged that the stated content-neutral interest of the town must be supported by evidence. *Id.* at 741. This is consistent with the court's opinion in the instant case. However, unlike the instant case, the *National Amusements* court determined that there was sufficient evidence before it, *Id.* at 741, and further proceedings were not necessary.

B. The Second Circuit

A thorough search of the case law from this circuit failed to identify any post-*Renton* cases on point. Consequently, there are no second circuit opinions that are in conflict with the decision of the third circuit in the instant case.

C. The Third Circuit

In addition to the case at hand, the third circuit has recently decided two other cases on point: *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), and *Contractors Association v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993). In *Mitchell*, the court considered and found proper the district court's reliance on evidence presented after the ordinance in question was enacted. *Id.* at 135. However, the court also found that the ordinance in question was justified on the pre-enactment evidence of secondary effects alone. *Id.* Consequently, the court expressly reserved the issue of whether ". . . a statute passed without any pre-enactment evidence of need or purpose" can be valid. *Id.* at 136. Thus, the opinion in the instant case is not at odds with that of the *Mitchell* court.

In *Contractor's Association*, the court considered the constitutionality of an ordinance favoring minorities, women and disabled persons in the award of Philadelphia construction contracts. *Id.* at 1000. Unlike the instant case which involves an intermediate level of constitutional scrutiny, the ordinance drew lines on the basis of race and was therefore subject to strict scrutiny. *Id.* Thus, the city had the burden of setting forth a strong evidentiary basis for concluding that there had been preexisting discrimination in the city's award of contracts and that the ordinance was necessary to prevent the continuing effects of such discrimination. *Id.* at 1001, 1002.

The plaintiffs argued that the ordinance should be held unconstitutional if the city council did not have the required evidentiary basis before it at the time of enactment. The court rejected that argument, holding that the city council did not have the required evidentiary record before it at the time it acted, but that it could justify the ordinance on the basis of evidence acquired thereafter. *Id.* at 1003, 1004. This decision is clearly

consistent with that of the instant case, as was noted by the court in the case at hand as follows:

> If we do not insist on a legislative record when we are required to subject a legislative measure to the highest scrutiny, we would be hard-pressed to rationalize insistence on a legislative record when we are, as here, applying a lesser, more deferential standard of constitutionality.

(A.31).

D. The Fourth Circuit

In *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415 (4th Cir. 1989), the court reversed a district court's holding that adult bookstore regulations were unconstitutional. The court determined that there was enough evidence before the County at the time of enactment to sustain the regulation's stated purpose of ameliorating secondary effects. In addition, in noting the district court's discounting of post-enactment evidence, the court stated the following:

> A cursory review of the case law reveals that courts have routinely admitted evidence at trial to supplement a legislative record or explain the stated interests behind challenged regulations. It would appear from reviewing the *Renton* case, for example, that testimony of this nature was admitted at trial and considered on appeal.

See also 15192 Thirteen Mile Road, Inc., v. City of Warren, 626 F. Supp. 803, 818 (E.D. Mich. 1985) (trial testimony "clearly

demonstrates that adult uses are a source of urban blight"). *Id.* at 1425.

The decision in the instant case is clearly consistent with that of the *11126 Baltimore Blvd.* court.

E. The Fifth Circuit

The Fifth Circuit Court of Appeals has decided several cases that are consistent with that of the instant case including *SDJ, Inc. v. City of Houston*, 837 F.2d.1268 (5th Cir. 1988), and *Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1268 (5th Cir. 1992). Like the instant case, both the *SDJ* and *Lakeland* courts acknowledged that the cities' stated attempts at ameliorating secondary affects associated with adult entertainment businesses must be supported by evidence. Further, both courts determined that such evidence existed in the record before the legislative bodies at the time of enactment, and further proceedings were not necessary.

F. The Sixth Circuit

As set forth above, the Sixth Circuit Court of Appeals decided the *Christy v. City of Ann Arbor* case, 824 F.2d 489 (6th Cir. 1987), in which the court determined that: (1) there was not enough evidence in the record for the district court to have determined that the ordinance in question was designed to ameliorate secondary effects; and (2) remanded the matter back to the district court for further proceedings. The decision in the instant case is entirely consistent with that of the Sixth Circuit Court of Appeals.

G. The Seventh Circuit

In *Berg v. Health and Hospital Corporation of Marion County, Ind.*, 865 F.2d 797 (7th Cir. 1989), the Court of Appeals

for the Seventh Circuit upheld an ordinance, finding that the legislative body relied upon evidence that was sufficient to demonstrate the potential for secondary effects. Consequently, further proceedings were not necessary. This decision, like those of the first through sixth circuits, is entirely consistent with that of the instant case.

H. The Eighth Circuit

In *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990), the Court of Appeals for the Eighth Circuit held that ***the introductory clauses to the city's ordinance*** restricting the viewing of movies within closed booths was sufficient to identify the legislative body's concerns with secondary effects. Specifically, the court stated:

> The Bridgeton ordinance introductory clauses, however, identify the council's concerns, which were the health and safety of the public, as well as describing its program for promoting those concerns, which consisted of the elimination of enclosed viewing booths. The findings of the Bridgeton County Council are consistent with the findings and stipulations made by other city councils or legislative bodies in Minneapolis, Minnesota, *Id.* at 615; Marion County, Indiana, *Berg v. Health and Hospital Corp.*, 865 F.2d 797, 803-04 (7th Cir. 1989); Newport News, Virginia, *Wall Distrib.*, 782 F.2d at 1169; and Phoenix, Arizona, *Ellwest Stereo Theatres v. Wenner*, 681 F.2d 1243, 1245 (9th Cir. 1982). Bridgeton attached to its motion for summary judgment certain pages out of the Final report of the Attorney

> general's Commission on pornography and, while there is no showing that the Bridgeton City Council was aware of this report or relied upon it, we at least observe the findings of the city council are consistent with that report, which has been referred to in at least one United States Supreme Court Opinion. *See Osborne v. Ohio*, __ U.S. __, 110 S. Ct. 1691, 1697, n.7, 109 L. Ed. 2d 98 (1990) (noting the report's discussion of the ills of child pornography). ***We believe that the "Whereas" clauses preceding the ordinance provide adequate factual undergirding for its enactment.***

Id. at 227 (emphasis added).

Consequently, petitioners' reliance on this case for the premise that, had the instant case been before the ninth circuit that court would have found Keyport's ordinance unconstitutional is totally unfounded. Instead, the above-quoted findings demonstrate the likelihood that the ninth circuit would have found that the "Whereas" clauses in Keyport's ordinance "provide adequate factual undergirding for its enactment" without even remanding the matter for further proceedings on this point.

I. The Ninth Circuit

In addition to *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987), which is discussed at length above and is entirely consistent with the decision at hand, the Ninth Circuit Court of Appeals decided *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986). There, the court was faced with an ordinance regulating barroom nude dancing. *Id.* The district court

had concluded that the King County Council had considered no evidence regarding the need for the ordinance before its adoption. *Id.* at 1111. However, the district court concluded that King County had adequately justified the ordinance by introducing affidavits from two police officers at the trial. *Id.* BSA argued that the *post facto* justification was impermissible and that a "claim of governmental interest must be supported by empirical, factual evidence actually considered at the time an ordinance is passed." *Id.* This is the same argument raised by petitioners in the instant case.

The Ninth Circuit Court found that BSA's argument was without merit for reasons including the following:

> First, it is sufficient that the County was able to present some evidence at the time of trial. In *Schad*, 452 U.S. at 72, 101 S. Ct. at 2184, the Supreme Court implied that the city could have justified its "substantial restriction of protected activity" by presenting evidence at trial. ***BSA provides not authority requiring that a legislative body need function like a court of law every time it considers legislation that may implicate the First Amendment.***

Id. at 1112 (emphasis added).

Similarly, in the case before this Court, petitioners have provided no such authority. In addition, the *Tollis* and *BSA* decisions demonstrate that the decision of the court below is wholly consistent with those of the Ninth Circuit Court of Appeals.

J. The Tenth Circuit

A thorough search of the case law has failed to identify any post-*Renton* cases on point. Consequently, there are no tenth circuit opinions that are in conflict with the decision of the third circuit in the instant case.

K. The Eleventh Circuit

In *International Eateries of America v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), the eleventh circuit upheld the constitutionality of an adult entertainment ordinance finding that, among other things, the legislative body relied on evidence that was sufficient to demonstrate its concern with secondary effects. *Id.* at 1164. This decision is entirely consistent with that of the third circuit in the instant case.

L. The Twelfth and Thirteenth Circuits

A thorough search of the case law has failed to identify any post-*Renton* cases on point. Consequently, there are no twelfth or thirteenth circuit cases that are in conflict with the decision of the third circuit in the instant case.

Based on a review of all of the relevant decisions cited above, it is apparent that, contrary to petitioners' assertions, the decision of the Court of Appeals for the Third Circuit in the instant case is entirely consistent with those of each and every circuit court. Consequently, petitioners' assertion that the "U.S. Court of Appeals for the Third Circuit has rendered a decision in conflict with at least eight other United States Courts of Appeal on the same important matter" (PB.14) is not correct and cannot serve as a basis for granting the petition.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT.

Petitioners argue that the United States Court of Appeals for the Third Circuit has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court (PB.14). A review of the specific Supreme Court cases cited by petitioners makes it apparent that there is no basis for this argument.

Petitioners contend that the decision below contradicts the decisions of this Court in *Renton v. Playtime Theaters*, 475 U.S. 41 (1985); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Turner Broadcasting System v. FCC*, 520 U.S. __, __ L. Ed. 2d 369 (1997). Specifically, petitioners cite the following passage of *Renton* in support of their contention:

> [t]he First Amendment does not require a city, before enacting [an adult use] ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*

Renton v. Playtime Theaters, 475 U.S. 41, 51-52 (emphasis added by petitioner).

From this language, petitioners conclude the following:

> It appears then that it is implicitly assumed in this Court's *Renton* decision that a legislative body must not only identify the interest served by an enactment restrictive of speech and articulate a reasoned and significant basis for its legislative action, it must do that *before* it acts and the objective and evidence on which the legislature relies should appear in the legislative record leading to the enactment.

(PB.24).

Petitioners' interpretation of the above-quoted *Renton* passage is totally unfounded and far reaching. There is nothing in that language to enable petitioner or this Court to "implicitly assume[]" that the *Renton* Court's directive that "whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses" means that a city must create a legally defensible legislative record before it acts. As the court explained in the opinion below "We find no such rule in *Renton*, *Mitchell* or any other governing precedent." (A.28). It stated further:

> There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted for the legislative body prior to the enactment of the legislative measure. ***We have always required the former; we have never required the latter.***

(A.28) (emphasis added).

Next, petitioners assert that Justice Powell's concurring opinion in *Young v. American Mini-Theatres, Inc.*, 438 U.S. 265, 320, n.54 (1978), provides support for their interpretation of *Renton* (PB.24) where he states that courts must be alert to the possibility that a city might use the power to zone as a pretext for suppressing expression. *Id.* at 320, n.54, *concurring opinion of Justice Powell.* However, Justice Powell's concerns are wholly consistent with the concerns expressed by the court below, as is evident from the following excerpt of the third circuit's opinion:

> . . . [O]ur First Amendment jurisprudence requires that the Borough identify the justifying secondary effects with some particularity, that they offer some record support for the existence of those effects and for the Ordinance's amelioration thereof, and that the plaintiffs be afforded some opportunity to offer evidence in support of the allegations of their complaint. To insist on less is to reduce the First Amendment to a charade in this area.

(A.22).

There is no question that, as petitioners point out, the Borough must identify the secondary effects it seeks to prevent through its ordinance in order to demonstrate that the ordinance is not a pretext for suppressing speech. However, petitioners' reiteration of this argument offers no support for their argument that the Borough was constitutionally bound to present such evidence prior to passing the ordinance. The court below practically and properly dealt with this issue by remanding the matter to the district court at which time the Borough will be required to make such a demonstration.

Finally, petitioners cite *Turner Broadcasting System v. FCC*, 520 U.S. __, 137 L. Ed. 2d 369 (1997), as allegedly supporting their argument that "a contemporaneous record of justification is required." (PB.25). There, this Court was reviewing the "must carry" provisions of the Cable Television Consumer Protection & Competition Act of 1992 adopted by Congress and held that the court must determine that "Congress has drawn reasonable inferences based on substantial evidence". Respondents submit the *Turner* decision is entirely consistent with the decision of the court below as is demonstrated by the third circuit court's reliance on same (A.20). The very purpose in remanding the matter to the district court is so that the Borough can attempt to make such a showing and petitioners have the opportunity to refute it (A.18).

Petitioners have failed to demonstrate that the decision of the Court of Appeals for the Third Circuit conflicts with any relevant decisions of the Supreme Court or other Courts of Appeals. Instead, a review of the decisions cited by petitioners demonstrates that the opinion below is entirely consistent with the decisions of this Court. Consequently, petitioners' argument cannot serve as a basis for this Court's jurisdiction and the petition should be denied.

III.

PETITIONERS' ARGUMENT THAT THE COURT BELOW PREMISED ITS DETERMINATION ON A MISCONCEPTION IS WITHOUT MERIT AND DOES NOT SERVE AS A BASIS FOR THE GRANTING OF THE PETITION.

Petitioners argue that the petition should be granted because the court below based its determination, in part, on a misconception (PB.19). Specifically, petitioners quote the

following sentence from the opinion as support for this contention:

> . . . most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures . . . [W]e believe that insistence on the creation of a legislative record is unwarranted intrusion into the internal affairs of the legislative branch of governments.

(PB.19; A.2).

In further support of this argument, petitioners cite a provision of the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-26a, as well as an excerpt of a decision of "a New Jersey Court" that purportedly interprets a similar provision of the Municipal Land Use Law (PB.21). However, petitioners provide no citation for the New Jersey court decision or for the provision of the Municipal Land Use Law that the court is interpreting and we have been unable to identify same. Accordingly, since respondents cannot identify the case petitioners fail to cite, it will address this portion of petitioners' argument in a general manner.

Petitioners' argument that the third circuit court's decision was premised on a "misconception" must fail for several reasons. First, the sentence quoted by petitioners and set forth above is merely that — one sentence in a lengthy opinion — that is taken out of context. The language that precedes and completes the paragraph from which this sentence was taken is as follows:

> There is a significant difference between the

> requirement that there be a factual basis for a legislative judgment and a requirement that such factual basis have been submitted to the legislative body prior to the enactment of the legislative measure, We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, their own life experience and common sense so ling as they come forward with the required showing in the courtroom once a challenge is raised.

(A.28-29).

It is clear that, taken in context, the court below did not rely on its assertion that "some municipal . . . councils . . . do not hold hearings and compile legislative records" in order to decide the case before it. This is particularly true since the decision below expressly states that the Borough of Keyport "held a public meeting to consider proposed Ordinance No. 31-92" that "[t]he Board had earlier solicited and reviewed a legal opinion concerning the Ordinance" that, at the hearing itself "heard an oral presentation by an engineering expert" and that the Planning Board "recommended that the council pass the proposed ordinance, but suggested three changes . . ." (A.7). Further, the court below made the following significant observation about the hearing:

> The minutes of the meeting indicate that, although the meeting was open to the public for comment, ***the sole comment on***

> ***Ordinance No. 31-92 was made by the Borough counsel . . .***

(A.7).

Therefore, not only was there a public hearing at which the Planning Board made recommendations, but the record reflects that the hearing was open for public comment and ***petitioners chose not to comment or speak out against the proposed Ordinance despite the opportunity to do so.***

The second problem with petitioners' argument is that they cite the Municipal Land Use Law to demonstrate that the third circuit court was wrong in stating that municipalities do not always hold hearings. Specifically, petitioners cite N.J.S.A. 40:55D-26a which states that, when adopting or amending a development regulation "the Planning Board *shall* make and transmit to the governing body . . . a report" and that, when considering adoption or amendment "the governing body shall review the report of the Planning Board . . ." (emphasis added). Petitioners rely on this language as proof that, contrary to the statement of the court below, a municipal governing body is required by state statute to hold hearings and compile a record (PB.20-21). However, petitioners left out the following significant portion of the statute:

> Failure of the planning board to transmit its report within the 35-day period provided herein ***shall relieve the governing body from the requirements of this subsection in regard to the proposed development regulation, revision or amendment thereto referred to the planning board.***

N.J.S.A. 40:55D-26a. This sentence renders petitioners' argument on this point null and void.

Finally, petitioners argue that, "a New Jersey court", in interpreting a provision of the Municipal Land Use Law that is similar to that of N.J.S.A. 40:55D-26a, explains the purpose and necessity of a contemporaneous record (PB.21). However, without providing a citation to either the case or the provision at issue, petitioners note that the provision "requires that a zoning ordinance ***that is inconsistent with the municipality's master plan*** be accompanied by a resolution giving the reason for the inconsistency." (PB.21).

This provision and therefore the case that petitioner claims interprets the provision is not applicable to the matter at hand. The Keyport Ordinance is not inconsistent with the municipality's master plan. To the contrary, as the court below points out, Ordinance No. 31-92 explicitly states that it is only the very adult entertainment uses that the Ordinance seeks to regulate that "conflict with the Borough Master Plan, particularly those segments listed on pages 16 and 19 therein which provide that a primary zoning objective is to preserve and protest [sic] existing residential areas and to enhance the desirability thereof." (A.8).

Thus, the Ordinance in this case will actually prevent inconsistencies with Keyport's master plan, and petitioners' final argument on this point must also fail.

CONCLUSION

For the foregoing reasons, the undersigned, on behalf of respondents the Borough of Keyport, Victor Rhodes and the Board of Adjustment of the Borough of Keyport, respectfully request that the petition for certification is denied.

Respectfully submitted,

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